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PLEADING THE FIFTH IN IMMIGRATION COURT: A REGULATORY PROPOSAL

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ABSTRACT

Protections of noncitizens' rights in immigration removal proceedings have remained minimal even as immigration enforcement has exponentially increased. An overlooked, but commonplace, problem in immigration court is the treatment of the constitutional right against self-incrimination. Two routine scenarios occur where noncitizens are asked to sacrifice their right against self-incrimination in immigration court. One involves testimony regarding conduct related to immigration status that may lead to prosecution for federal immigration violations, such as illegal entry, illegal reentry, or alien smuggling. The other involves testimony regarding any other potentially criminal activity, including when the noncitizen currently has pending charges in criminal court yet is expected to testify about the underlying facts of the case during immigration court proceedings. In both of these circumstances, the immigration system puts noncitizens in the

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untenable position where they must either elect to waive the constitutional right not to self-incriminate and testify regardless of possible criminal consequences, or exercise their right to silence and risk the immigration judge drawing an adverse inference that could result in deportation.

The skewed incorporation of criminal norms into the immigration arena—a supposedly civil system—without a simultaneous expansion of procedures designed to protect and enforce noncitizens' rights leads to disastrous results. Moreover, the lack of procedural fairness in removal proceedings exaggerates the imbalance of power between the federal government, with its immense resources, and the individuals it seeks to deport. Considering the broad powers granted to the executive and legislative branches of government to regulate immigration, and the attendant limited oversight by Article III courts, the courts are not likely to provide the most efficient or far-reaching solution. Thus, this Article posits that, rather than utilizing the traditional judicial avenue for vindicating constitutional rights, federal agency regulatory rulemaking is the best way forward. The Article then offers proposed regulatory language that is intended to provide a meaningful procedural vehicle through which noncitizens' right against self-incrimination may be enforced. The proposed regulations provide that immigration judges must advise noncitizens of their right to remain silent, prohibit judges from drawing an adverse inference where noncitizens have pending criminal charges, clarify the procedures that must be followed in order to compel speech, and limit the government's use of evidence obtained as a result of statutory or regulatory violations.

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INTRODUCTION

> *Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.*[1]

The Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[2] This negative right is alternately described as the right not to be compelled to be a witness against oneself,[3] the right to remain silent,[4] the right against self-incrimination,[5] or the privilege against self-incrimination.[6] This Article examines the extent to which the right has been deemed to apply in the context of removal proceedings. It argues that this constitutional protection should be more fully available—with some nuances—to noncitizens facing removal, due to the increasingly intertwined nature of criminal and immigration law.[7]

At the time the Bill of Rights was written, immigration control was not yet a widely accepted, or agreed-upon, concept.[8] Over time, the Supreme Court of the United States developed a theory that the power to exclude or expel was part of a nation's inherent sovereign rights. Thus, the Court endorsed the idea that Congress has the power to determine who is permitted to enter or remain within the United States, and immigration is therefore considered a system of civil regulation. On those grounds, federal courts

1. Bridges v. Wixon, 326 U.S. 135, 154 (1945).
2. U.S. CONST. amend. V.
3. *Id.*
4. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2625 (1996).
5. *See generally* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968) [hereinafter LEVY, ORIGINS OF THE FIFTH AMENDMENT].
6. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533–35 (1999).
7. The term "noncitizen" is used throughout this Article because the word encapsulates all people who properly can be subject to removal proceedings, which includes people in "nonimmigrant" statuses. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that the executive has jurisdiction to order deportation "only if the person arrested is an alien"). This is not to discount the fact that sometimes U.S. citizens are improperly placed in removal proceedings and/or deported. *See generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (analyzing cases of people in removal proceedings who were later determined to be U.S. citizens).
8. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (describing "[t]he Nation's first 100 years [as] 'a period of unimpeded immigration'" (quoting CHARLES GORDON & HARRY N. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE 5 (1959))).

have declined to extend a variety of procedural protections available in criminal proceedings to immigration proceedings.[9]

However, clinging to a stagnant understanding of individuals' rights in an environment of increasingly frequent and severe immigration enforcement amplifies the possibility of serious and widespread injustices. This phenomenon has been described as the "asymmetric" incorporation of criminal norms into the immigration system.[10] The overlap between criminal and immigration law (including immigration consequences for convictions, cooperation of local and state law enforcement with immigration authorities, and the inevitability of transfer to immigration custody following a criminal arrest) is increasing—a process many scholars refer to as "crimmigration."[11] Immigration enforcement officers' tactics largely mirror the law enforcement strategies used to arrest and prosecute people accused of crimes, and state and local law enforcement regularly engage—legally or not—in those immigration enforcement strategies. Additionally, through legislation, case precedent, and opinions issued by the Attorney General, immigrants are increasingly civilly penalized for lesser and lesser crimes, with convictions carrying greater consequences in immigration proceedings.

And yet, the right against self-incrimination has been deemed to have limited application because immigration proceedings are considered "civil." Thus, noncitizens in immigration proceedings may choose to remain silent if they believe the testimony "might have a tendency to incriminate him or furnish proof of a link in a chain of evidence,"[12] but not without legally sanctioned consequences. Namely, the immigration judge is permitted to

9. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (declining to extend the exclusionary rule to deportation proceedings); Xu Yong Lu v. Ashcroft, 259 F.3d 127, 131 (3d Cir. 2001) (holding that there is no Sixth Amendment guarantee of appointed counsel in removal proceedings); Baires v. INS, 856 F.2d 89, 90–91 (9th Cir. 1988) (holding that noncitizens in removal proceedings have a right to procedural due process under the Fifth Amendment, but not a right to counsel pursuant to the Sixth Amendment); U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 156–57 (1923) (finding that the rule excluding involuntary confessions does not apply in deportation proceedings); Carlson v. Landon, 342 U.S. 524, 544–46 (1952) (stating that Eighth Amendment requirement of reasonable bail does not apply in some deportation cases).

10. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 527–528 (2007).

11. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666 (2011).

12. Matter of Carrillo, 17 I&N Dec. 30, 33 (BIA 1979) (citing Matter of R-, 4 I&N Dec. 720, 721 (BIA 1952)).

draw an adverse inference from the noncitizen's silence.[13] While an adverse inference is not sufficient for the government to meet its burden of proof on alienage or removability absent other evidence,[14] adverse inferences greatly disadvantage noncitizens seeking bond or relief from removal. Noncitizens' right against self-incrimination is therefore undermined during immigration proceedings. The procedures currently available do not adequately account for the quasi-criminal nature of some aspects of removal proceedings, or for the fact that many noncitizens do not have legal representation.

Constitutional rights are meaningless without procedural vehicles through which they can be enforced. As the United States Supreme Court stated in *Miranda v. Arizona*, there must be "procedural safeguards effective to secure the privilege against self-incrimination."[15] A primary function of the right against self-incrimination is to prevent government overreach.[16] Considering the immense powers of the government, the right against self-incrimination is critical in restoring some semblance of balance between the individual and the state.

Large numbers of people are affected by the immigration system every year. For example, in the five-year period from 2013–2017, there were more than 1.5 million people removed from the United States.[17] In fiscal year 2019, the Department of Justice (DOJ) reported that there were 987,000 cases pending in the immigration courts.[18] The Department of Homeland Security (DHS) filed 444,000 new cases in fiscal year 2019 alone, which marked the highest number of cases filed in a single year in United States history.[19] In a system that is currently affecting nearly one million people, not to mention their families and broader communities, society should be concerned about whether the proceedings are being conducted fairly. In addition to general considerations of morality and individual dignity, procedural fairness is also critical to the perceived legitimacy of the legal system, which in turn affects whether people are likely to comply with the law.[20]

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13. *Bilokumsky*, 263 U.S. at 154.

14. Matter of Guevara, 20 I&N Dec. 238, 242 (BIA 1991).

15. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

16. United States v. Balsys, 524 U.S. 666, 693 (1998).

17. 432,448 people were removed in 2013; 405,620 in 2014; 326,406 in 2015; 333,592 in 2016; and 295,364 in 2017. *Table 39. Aliens Removed or Returned: Fiscal Years 1892 to 2017*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/yearbook/2017/table39 (last updated Apr. 9, 2019) [https://perma.cc/5WLV-ZDQU].

18. Press Release, U.S. Dep't of Justice, Executive Office for Immigration Review Announces Case Completion Numbers for Fiscal Year 2019 (Oct. 10, 2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-announces-case-completion-numbers-fiscal-year-2019?utm_medium=email&utm_source=govdelivery [hereinafter EOIR Case Numbers] [https://perma.cc/8TZ5-BENV].

19. *Id.*

20. Emily Ryo, *Legal Attitudes of Immigrant Detainees*, 51 L. & SOC'Y REV. 99, 104 (2017) [hereinafter Ryo, *Legal Attitudes*].

Application of the right against self-incrimination in immigration court is an underexplored area. In 1990, Daniel Kanstroom wrote on the subject in the context of Immigration and Naturalization Service attorneys seeking to establish elements of their prima facie cases by compelling respondents to testify in immigration court.[21] Kanstroom addressed the extent to which those practices raised constitutional and policy questions. Since Kanstroom's article, there have been numerous legal developments in both immigration proceedings and the scope of the right against self-incrimination in criminal law that call for further examination of these issues.

More recent scholarship has explored the right against self-incrimination during encounters with law enforcement.[22] Jennifer M. Chacón raised the right against self-incrimination in terms of the limited application of both Fourth and Fifth Amendments in removal proceedings, illuminating how immigration courts were not designed, and are not equipped, to handle certain constitutional challenges.[23] Violeta R. Chapin has called for witnesses to crimes to exercise the right to silence as an act of civil disobedience in response to increasing immigration enforcement.[24]

This Article adds to the scholarly discourse by focusing on the effect of "pleading the Fifth" in immigration court. Part I describes how the Fifth Amendment right against self-incrimination is currently applied during court proceedings, both in criminal and general civil courts. Part II examines the current categorization of immigration removal proceedings under the "civil" umbrella and addresses the need for procedural safeguards in immigration court due to the increasing criminalization of immigration. Part III delves into the scope of the right against self-incrimination in immigration court, including an analysis of how the effect of "pleading the Fifth" may differ based on considerations such as the burdens of proof and the scenario in which the right is raised. Part IV highlights the specific deficiencies in courts' treatment of the right against self-incrimination in immigration proceedings and argues that, due to the quasi-criminal nature of such proceedings, noncitizens must be able to exercise the right more effectively. While this Article does not mean to imply that criminal proceedings provide a gold standard of procedural protections, it argues that a more robust application of this constitutional protection to noncitizens in removal proceedings would be far better than the current state of the law.

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21. Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599 (1990).

22. Linus Chan, *The Promise and Failure of Silence as a Shield Against Immigration Enforcement*, 52 VAL. U. L. REV. 289 (2018).

23. Chacón, *supra* note 11.

24. Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119 (2011).

Lastly, to address the need for procedural safeguards in removal proceedings in an efficient and wide-reaching manner, Part V proposes new federal regulations that clarify, support, and expand the application of the right against self-incrimination in this context.

I. SCOPE OF THE FIFTH AMENDMENT

The right against self-incrimination has roots in the Latin maxim *nemo tenetur seipsum prodere*, which means "no man is bound to accuse himself."[25] Although the Fifth Amendment states that people cannot be compelled "*in any criminal case* to be a witness against himself,"[26] the right against self-incrimination can also be invoked in civil contexts where the information could be used in later criminal proceedings.[27] It is further clear that the Self-Incrimination Clause extends to state proceedings,[28] and protects noncitizens and citizens alike.[29] The Self-Incrimination Clause does not provide protection for anything other than testimony. While the Fifth Amendment's testimonial protections have been hailed as a fundamental aspect of our criminal justice system, non-testimonial incriminating evidence, such as blood samples or incriminating documents, is not protected.[30]

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25. Leonard W. Levy, Origins of the Fifth Amendment *and Its Critics*, 19 CARDOZO L. REV. 821, 832 (1997) (responding to various criticisms of his book, LEVY, ORIGINS OF THE FIFTH AMENDMENT, *supra* note 5). This Article refers to the "right" rather than the "privilege" against self-incrimination as a recognition of its stature as a constitutional provision. The terms "right" and "privilege" are often used interchangeably by both courts and scholarly publications. On one hand, scholar Leonard Levy proclaimed that he does not refer to it as a "privilege" because "[p]rivileges are concessions granted by the government to its subjects and may be revoked." LEVY, *supra* note 5, at vii. He states that, because the concept is enshrined in the Constitution, it holds "the same status as other rights, like freedom of religion, that we would never denigrate by describing them as mere privileges." *Id.* On the other hand, information protected by a legitimate assertion of the right is considered "privileged" pursuant to the Federal Rules of Civil Procedure. FED. R. CIV. P. 26(b)(5). Judge Richard A. Posner calls the clause "[t]he most hallowed, and yet at the same time one of the most questionable, of the evidentiary privileges." Posner, *supra* note 6, at 1533. Judge Posner identifies tension in the doctrine, first noting that non-self-incrimination "denies the court highly probative evidence." *Id.* However, Judge Posner also recognizes that there is a strong policy argument for preserving an individual's peace by forcing the government to procure evidence "from sources other than the individual." *Id.* at 1533–34 (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2251, at 317 (John T. McNaughton ed., rev. ed. 1961)).

26. U.S. CONST. amend. V (emphasis added).

27. United States v. Balsys, 524 U.S. 666, 672 (1998).

28. Malloy v. Hogan, 378 U.S. 1, 3 (1964) (recognizing that the right against self-incrimination extends to the states via the Fourteenth Amendment).

29. Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted).

30. Alschuler, *supra* note 4, at 2635–36.

A. Criminal Proceedings

Several aspects of the Fifth Amendment have developed over time in Supreme Court jurisprudence, yielding an uneven application throughout history. Case law reflects the disparate views of the scope of the right against self-incrimination and shows how the scope changes depending on the makeup of the high court. Several cases have been hotly contested among the justices, and much of the case law also appears internally inconsistent. Before diving into a discussion of the right, it will be helpful to observe how the right against self-incrimination developed prior to and throughout American jurisprudence, and its limitations.

1. History of the Right

The history of the right against self-incrimination in criminal proceedings has been extensively debated.[31] From some scholars' perspective, the principle has not been consistently applied throughout the centuries, but rather appears to have transformed along with developments in the burden of proof and availability of counsel.

In English trials during the mid-1500s, defendants bore the burden of proving innocence. The manner of trials was termed "accused speaks," where the accused was expected to defend themselves by responding directly to evidence and witnesses at trial.[32] The "accused speaks" manner of criminal trials meant that a defendant who remained silent would simply lose their case.[33] Thus, due to trial procedure during that era, the right against self-incrimination simply could not have been an effective form of defense.

Moreover, there was no right to counsel, and defense counsel were even prohibited in felony and treason cases.[34] The prohibition on defense counsel lessened beginning in the 1690s, paving the way for the nature of criminal trials to shift from the "accused speaks" trial where defendants had to prove their innocence, to the type of criminal trials we have today where the prosecution bears the burden of proof.[35] The English courts eventually

31. *See, e.g.*, Levy, *supra* note 25, at 832 (responding to various criticisms of his book, LEVY, ORIGINS OF THE FIFTH AMENDMENT, *supra* note 5).

32. The right began as something akin to "probable cause," where a person would not be required to answer incriminating questions unless there were other existing reasons for suspecting them. R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 7 (1997); John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT, *supra*, at 83.

33. Langbein, *supra* note 32, at 108.

34. *Id.* at 84 n.6.

35. *Id.* at 97.

imposed the standard that the prosecution had to establish guilt "beyond a reasonable doubt."[36]

The idea that "no man is bound to accuse himself" was imported to colonial America, eventually becoming one of the fundamental rights proclaimed in the Fifth Amendment of the United States Constitution. As the Supreme Court noted, the American colonists considered the right to refuse to speak, "which in England was a mere rule of evidence," so fundamental that it should be "clothed in this country with the impregnability of a constitutional enactment."[37]

2. Rationales

Examination of the Supreme Court's articulation of the reasoning behind the Self-Incrimination Clause demonstrates how its interpretation of the right has changed over time. Additionally, understanding the underlying purpose of the Clause aids in the determination of whether the right against self-incrimination should apply in particular circumstances.[38] It bears briefly exploring the convoluted explanations and outright rejection of the Court's own prior statements by later iterations of the bench.

In the 1950s, the Supreme Court proclaimed that a primary rationale was that it is better for an occasional crime to go unpunished than the prosecution be free to build up a criminal case with the assistance of compelled disclosures of the defendant. The right protects the innocent as well as the guilty.[39] However, that rationale was disputed just one year later, when the Court more narrowly stated that the purpose of the Self-Incrimination Clause was to protect the innocent.[40]

The following decade, the Court decided *Murphy v. Waterfront Commission of New York Harbor*, where the Court recited the policies underlying the "privilege" against self-incrimination as including the following:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our

36. *Id.* at 98.

37. Miranda v. Arizona, 384 U.S. 436, 443 (1966) (quoting Brown v. Walker, 161 U.S. 591, 596–97 (1896)).

38. Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 54 (1964) (stating that whether a witness may be compelled to testify in one jurisdiction where he may be incriminated under the laws of another jurisdiction "must depend, of course, on whether such an application of the privilege promotes or defeats its policies and purposes"), *abrogated by* United States v. Balsys, 524 U.S. 666 (1998).

39. Ullmann v. United States, 350 U.S. 422, 427 (1956).

40. Grunewald v. United States, 353 U.S. 391, 421 (1957) ("Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men.") (emphasis in original).

> preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[41]

Based on the "history, policies and purposes" of the Self-Incrimination Clause, the *Murphy* Court held that witnesses in state proceedings enjoy protections from incrimination under federal law, and vice versa.[42]

However, the majority in *United States v. Balsys* later rolled back the holding of *Murphy*, explaining that the historical analysis in *Murphy* was "fatally flawed," and holding that the Fifth Amendment could not be invoked to avoid testifying based on fear that the testimony would be used in foreign criminal prosecutions.[43] The *Balsys* majority also emphasized that preventing government overreach was the true value at the center of the Self-Incrimination Clause.[44] This is presently understood to be the primary accepted rationale.[45]

41. *Murphy*, 378 U.S. at 55 (citations omitted) (quoting WIGMORE, *supra* note 25, at 317; United States v. Grunewald, 233 F.2d 556, 581–82 (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957); Quinn v. United States, 349 U.S. 155, 162 (1955)).

42. *Id.* at 77–78.

43. United States v. Balsys, 524 U.S. 666, 688, 700 (1998).

44. *Id.* at 693. Another theory that has been widely written about, but was explicitly rejected in *Balsys*, is that the right against self-incrimination supports the right to lead a private life. *See, e.g.*, HELMHOLZ ET AL., *supra* note 32, at 4; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 444 (1995) (stating that privacy is the center of search and seizure law); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1067–68 (1986) (arguing that compelled self-incrimination violates individual privacy); B. Michael Dann, *The Fifth Amendment Privilege Against Self-Incrimination: Extorting Physical Evidence from a Suspect*, 43 S. CAL. L. REV. 597, 598, 611 (1970) (asserting that the Self-Incrimination Doctrine includes a privacy-based theory).

45. *See, e.g.*, Jennifer Reich, *A New Hurdle to International Cooperation in Criminal Investigations: Whether Foreign Government-Compelled Testimony Implicates the Privilege Against Self-Incrimination*, 166 U. PA. L. REV. 789, 823 (2018) (weighing effect of a proposed test on the right against self-incrimination, including whether the test would "save judicial resources without detracting from the goal of preventing government overreach").

3. Procedural Elements

A substantive constitutional right such as non-self-incrimination is meaningless without procedural mechanisms to ensure that the right is protected. What is described broadly as the "right against self-incrimination" is actually a bundle of rights that can be invoked at different stages before and during criminal proceedings.

a. Refusal to Testify at Trial

Broadly stated, a person can choose to remain silent in the face of questioning at trial. A criminal defendant has the right to choose whether to testify, and the defendant's silence cannot be commented on by the judge or the prosecutor in front of a jury.[46]

However, there are some limitations to the application of the right against self-incrimination that bear explanation. First, a party may seek to compel testimony from the person asserting the right. For example, a witness can be compelled to testify if the party seeking the testimony obtains a grant of immunity from prosecution.[47] There are three types of immunity: one that bars the government from using the testimony as evidence but allows possible future prosecution for the crime (use immunity); one that prohibits the government from using information that was directly or indirectly obtained against the person (derivative use immunity); and one that protects the immunized witness from ever being prosecuted for any offense related to the testimony (transactional immunity).[48] If immunity is granted, the person's silence will be considered "unprivileged," and they can be compelled to speak or face consequences.[49]

b. Prohibition on Use of Compelled Statements

Beyond the general trial right to remain silent, there is also a prohibition on the use of pretrial statements that were obtained by compulsion. Specifically, in *Murphy*, the Supreme Court stated that one critical way the Fifth Amendment is applied to protect rights is that "[t]he Government may not use compulsion to elicit self-incriminating statements," and that "the Government may not permit the use in a criminal trial of self-incriminating

46. Griffin v. California, 380 U.S. 609, 615 (1965).

47. *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 254–55 (1983); Kastigar v. United States, 406 U.S. 441, 460 (1972).

48. AM. BAR ASS'N SECTION OF ANTITRUST L., THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION 7 (2001) [hereinafter ABA TREATISE].

49. *Kastigar*, 406 U.S. at 453.

statements elicited by compulsion."[50] Generally, the right may be raised either by the person testifying or their attorney.[51] The right must be asserted "on a question-by-question basis, and thus as to each question asked, the party has to decide whether or not to raise his Fifth Amendment right."[52]

c. Custodial Interrogations

In *Miranda v. Arizona*, the Supreme Court extended the right to remain silent to unsworn custodial interrogations by law enforcement, in order to protect criminal defendants' rights at trial.[53] Once a person invokes their right to remain silent, or their right to speak to an attorney, the police must cease interrogation, and any statements made without these procedural safeguards will be inadmissible in court.[54] However, *Miranda* warnings must only be given when the person being interrogated is in custody, meaning that the person's freedom has been limited "in any significant way."[55]

Limitations on what initially appeared to be a broad right have developed over time. As Erwin Chemerinsky has explained, the Roberts Court in particular rolled back the right against self-incrimination in a manner exhibiting a "lack of concern with precedent and stare decisis."[56] For example, the Court held that self-incriminating speech during an investigation when the defendant was not yet under arrest was not protected,[57] nor were the defendant's changes in demeanor during the course of the interview barred from being offered as incriminating evidence.[58] More recently, the Supreme Court held that a suspect waived his right to remain silent once he made "an uncoerced statement to the police,"[59] even though he had sat "tacit and uncommunicative through nearly three

50. 378 U.S. 52, 57 n.6 (1964) (citing Haynes v. Washington, 373 U.S. 503, 513 (1963); Counselman v. Hitchcock, 142 U.S. 547, 586 (1892)), *abrogated by* United States v. Balsys, 524 U.S. 666, 674 (1998).

51. *See, e.g.*, Gutierrez v. Holder, 662 F.3d 1083, 1085, 1091 (9th Cir. 2011); Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1019 (9th Cir. 2006); Murdock v. Att'y Gen. of U.S., 131 F. App'x 360, 361 (3d Cir. 2005); Bigby v. INS, 21 F.3d 1059, 1063 (11th Cir. 1994); *but see* United States v. Schmidt, 816 F.2d 1477, 1481 n.3 (10th Cir. 1987) ("Only the appellants, not their counsel, are the proper parties to interpose a claim of privilege personal to themselves to prevent compelled disclosures . . . .").

52. *See Garcia-Quintero*, 455 F.3d at 1019 (quoting Doe *ex rel.* Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000)).

53. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

54. *Id.* at 444–45.

55. *Id.* at 444.

56. Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 19 (2010).

57. Salinas v. Texas, 570 U.S. 178, 185–86 (2013).

58. *Id.* at 182.

59. Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010).

hours of police interrogation" prior to making the statement.[60] Chemerinsky has noted that *Thompkins* created a presumption of admissibility of confessions, unless the suspect has explicitly stated his wish to remain silent.[61] Ironically, the Court's ruling therefore means that suspects must *speak* in order to invoke the right to remain silent.[62]

Lastly, there is significant confusion around the issue of when someone is considered to be "in custody." The considerations include "the nature and context of the questions asked, together with the nature and degree of restraints placed on the person questioned."[63]

The continually developing jurisprudence surrounding the right against self-incrimination in the context of custodial interrogations highlights the clause's incredible complexity, as well as the difficulty for lay people to effectively exercise their rights.

B. Civil Proceedings, Generally

The right against self-incrimination can be raised in civil proceedings, yet to a more limited extent than in criminal settings.[64] A person may refrain from answering questions in any context where their statements "might incriminate [them] in future criminal proceedings."[65] To be clear, however, the right cannot be invoked merely to avoid civil penalties.[66]

Importantly, as opposed to the rule in criminal proceedings where the judge and prosecutor are prohibited from commenting on the accused person's silence,[67] there is a "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties *to civil actions* when they refuse to testify in response to probative evidence offered against them."[68] Thus, in civil cases, once probative evidence has been introduced, the trier of fact—whether the jury or the judge in a bench trial—is permitted to draw an adverse inference based on the refusal to testify.[69]

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60. *Id.* at 391 (Sotomayor, J., dissenting).

61. Erwin Chemerinsky, *Supreme Court—October Term 2009 Foreword: Conservative Judicial Activism*, 44 LOY. L.A. L. REV. 863, 882 (2011).

62. *Thompkins*, 560 U.S. at 391 (Sotomayor, J., dissenting); *see also* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1514 (2011) (discussing the rollback of *Miranda* protections).

63. United States v. FNU LNU, 653 F.3d 144, 154 (2d Cir. 2011) (citing Berkemer v. McCarty, 468 U.S. 420, 441 n.34 (1984)).

64. An early commentator on the right against self-accusation, Samuel von Pufendorf, concluded in 1729 that the right should apply in both civil and criminal cases. LEVY, *supra* note 25, at 373.

65. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

66. Mertsching v. United States, 704 F.2d 505, 507 (10th Cir. 1983).

67. Griffin v. California, 380 U.S. 609, 615 (1965).

68. *Baxter*, 425 U.S. at 318 (emphasis added).

69. ABA TREATISE, *supra* note 48, at 79 (citing *Baxter*, 425 U.S. at 318).

Invoking the right does not automatically cease all inquiry during civil proceedings. To determine whether the right has been properly invoked, a court first considers whether the witness's testimony (or evidence) might tend to incriminate the witness, meaning that the testimony would support a criminal conviction or would constitute a link in the chain of evidence needed to convict the witness of a crime.[70] The court then ascertains whether there is a risk that the witness faces the possibility of being prosecuted for a crime.[71] The *likelihood* that a person will be prosecuted is not the determining factor.[72] Rather, if the court finds that prosecution is merely *possible*, the person is entitled to remain silent. However, the court may compel the witness to testify under certain circumstances. For example, the court must ascertain whether the person has been granted immunity from prosecution, as discussed *supra*,[73] or whether the statute of limitations has run on the potential crime.[74] If the statute of limitations has run, prosecution will not be possible, and the right against self-incrimination would not be deemed to apply.

The Supreme Court has imposed other limits on the application of the right against self-incrimination in civil proceedings. For example, *United States v. Balsys* involved the Office of Special Investigations of the Criminal Division of the United States Department of Justice (DOJ), which initiated denaturalization and deportation proceedings against suspected Nazi war criminals. In that case, the DOJ sought enforcement of a subpoena against a noncitizen who was being investigated for such activity.[75] At a deposition, Balsys refused to answer questions, asserting his right against self-incrimination on the grounds that he would face prosecution in Lithuania, Israel, and Germany, even though he would not be subject to criminal prosecution in the United States.[76] Thus, the question presented to the Supreme Court was whether a lawful permanent resident suspected of being a Nazi collaborator could assert the right against self-incrimination for the purpose of avoiding foreign prosecution.[77] The Court analyzed the meaning of "a criminal case" and held that concern about foreign prosecution was beyond the scope of the right articulated in the Constitution.[78] Thus, the extent of the right against self-incrimination was narrowed further in the civil context.

70. Hoffman v. United States, 341 U.S. 479, 486 (1951).
71. *Id.*
72. ABA TREATISE, *supra* note 48, at 28.
73. *See supra* Part I.A.3.a.
74. *Id.*
75. United States v. Balsys, 524 U.S. 666, 669–70 (1998).
76. *Id.* at 670.
77. *Id.* at 669–70.
78. *Id.* at 669.

II. THE NATURE OF IMMIGRATION & IMMIGRATION COURT PROCEDURE

As described above, it is broadly accepted that the Fifth Amendment right against self-incrimination may be exercised in civil proceedings, where testimony given in those proceedings could lead to a criminal prosecution.[79] The civil application of the right is also available in immigration court.[80] However, such protection does not go far enough in the immigration context. First, rules and procedures deemed essential to fairness in other civil matters do not apply in immigration courts. Evidence is admissible in immigration court so long as it is probative and not fundamentally unfair.[81] Moreover, the Federal Rules of Evidence are not binding in immigration court.[82] Nor are the Federal Rules of Civil Procedure, which protect information that may be deemed privileged.[83] Second, although the immigration system is characterized as civil, it functions in a quasi-criminal manner in many important aspects. And even as the enforcement model of criminal law is increasingly imported into immigration proceedings, the procedural protections are not.

A. Immigration as a Civil System

In criminal cases, constitutional provisions found in the Fourth, Fifth, Sixth, and Fourteenth Amendments apply.[84] In immigration cases, the far more limited constitutional protections stem from the Due Process Clause of the Fifth Amendment.[85] One justification given for such restricted

79. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); *see also* Matter of Carrillo, 17 I&N Dec. 30, 32–33 (BIA 1979).

80. "The Board of Immigration Appeals correctly ruled that some of the evidence of the petitioner's employment was inadmissible because it was elicited from the petitioner on the stand after he was improperly denied his Fifth Amendment privilege against self-incrimination." Tashnizi v. INS, 585 F.2d 781, 782 (5th Cir. 1978).

81. Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505–06 (BIA 1980). Although "[t]he use of admissions obtained from a respondent involuntarily to establish deportability is fundamentally unfair," there is a high bar for involuntary admissions, which must involve "coercion or duress" such as "physical abuse, hours of interrogation, denial of food or drink, threats or promises, or interference with any attempt by the respondent to exercise his rights." *Id.* at 505, 506 (citing Matter of Garcia, 17 I&N Dec. 319, 321 (BIA 1980)).

82. Matter of D-R-, 25 I&N Dec. 445, 458 (BIA 2011). However, it bears noting that the BIA in *Matter of D-R-* went on to analyze the sufficiency of authentication of documents using Federal Rule of Evidence 901(a)-(b)(1). *Id.* at 459.

83. FED. R. CIV. P. 26(b)(5).

84. Franklin G. Whittlesey, *Fourth and Fourteenth Amendments—Substantive Due Process—Malicious Prosecution Does Not Constitute a Deprivation of Liberty Actionable as a Constitutional Tort Pursuant to the Due Process Clause—*Albright v. Oliver*, 114 S. Ct. 807 (1994)*, 5 SETON HALL CONST. L.J. 269, 280–81 (stating that explicit criminal justice protections are afforded under the Fourth, Fifth, Sixth, and Eighth Amendments).

85. César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison*

constitutional protections in the immigration arena is the broad sovereign power of the federal government to control exclusion of foreigners from the United States.[86] A second reason is the related categorization of immigration proceedings as being "civil" in nature.[87]

Immigration to the United States was largely unrestrained from the nation's founding until 1875, when Congress determined that two populations should be barred from entry: "convicts and prostitutes."[88] It was not until 1917 that the government began deporting people who had been convicted of crimes after they had already arrived in the United States.[89] Congress's passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 also substantially changed immigration law to increase the likelihood that criminal behavior would lead to deportation.[90]

Over time, the Supreme Court's theory that the power to exclude or expel people was part of a nation's inherent sovereign rights has led to its conclusion that Congress has "absolute and unqualified" power to regulate exclusion or expulsion of those who are not citizens of the United States.[91] This congressional function is now commonly referred to as "plenary power."[92] The Supreme Court, on this basis, has stated that it holds limited authority to review the constitutionality of immigration statutes or otherwise consider whether there have been violations of individual rights, in that the judiciary may only intervene to the extent it is "authorized by treaty or by

Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel, 21 BERKELEY LA RAZA L.J. 17, 25–32 (2011) (describing the limited applications of the Fifth Amendment Due Process Clause in immigration law).

86. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 604 (1889) ("The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.").

87. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

88. Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (citing Page Act of 1875, Pub. L. No. 43-114, 18 Stat. 477).

89. Stumpf, *supra* note 11, at 382; *see also* Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262, 263 (1959).

90. Anita Ortiz Maddali, Padilla v. Kentucky*: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1, 18–19 (2011).

91. Fong Yue Ting v. United States, 149 U.S. 698, 707, 713 (1893). The Supreme Court's reliance on the extra-constitutional principle of "sovereignty" as the basis for the power to exclude and expel has been subject to criticism. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 184–86 (1987).

92. LEGOMSKY*, supra* note 91, at 194–200.

statute, or is required by the paramount law of the Constitution."[93] Thus, although Congress has broad power to exclude or expel, and immigration cases are currently seen as civil rather than criminal, this broad power is still subject to certain constitutional limitations.[94]

The categorization of immigration proceedings as "civil" is rooted in the plenary power doctrine.[95] In short, because of the federal government's broad power to regulate immigration, removal proceedings are simply viewed as an administrative process "enforcing the return to his own country of an alien who has not complied" with the government's conditions for remaining.[96] Thus, as explained in *Fong Yue Ting*, "deportation is not a punishment for crime," and the due process "provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."[97]

This "civil nature" reasoning was later upheld in a 1984 seminal case, *INS v. Lopez-Mendoza*, in which the Supreme Court explained that various protections afforded in criminal cases do not apply in deportation proceedings. [98] Thus, although criminal procedure allows for the suppression of statements or other evidence obtained as a result of an unlawful arrest, the Court held that the exclusionary rule was not available to noncitizens in removal proceedings. Rather, the Court imposed a new standard that a noncitizen must show not only a constitutional violation, but that the circumstances were sufficiently "egregious" to undermine the probative value of the evidence or make use of the evidence fundamentally unfair.[99]

Later cases clarified that racial profiling was egregious enough to justify use of the exclusionary rule. For example, two cases in the Ninth Circuit pointed out the repugnant nature of race-based Fourth Amendment violations where noncitizens were stopped based on their racial appearance

93. *Fong Yue Ting*, 149 U.S. at 713.

94. *See id.*; Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

95. Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485, 497 (2018).

96. *Fong Yue Ting*, 149 U.S. at 730. For a historical perspective on this case, see KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965, at 64–91 (2017).

97. *Fong Yue Ting*, 149 U.S. at 730.

98. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

99. *Id.* at 1050.

or surname.[100] Other circuits have followed suit in determining that racial profiling is an egregious circumstance that may give rise to exclusion.[101]

The *Lopez-Mendoza* Court also specifically stated that it did not consider whether the immigration officials violated their own regulations, and further noted that the Court could revisit its ruling in the future if confronted with a pattern of "widespread" violations.[102] Thus, the Court left those areas open to further litigation.

Yet, for all these restrictions stemming from the plenary power doctrine, courts have still found ways to address substantive violations. As noted by Hiroshi Motomura, when courts have been troubled by the harshness of plenary power, they instead have construed issues as "procedural" and reached a decision through that lens.[103]

Just a few years after the Supreme Court explained that aspects of due process did not apply to deportation proceedings in *Fong Yue Ting*, the Court proclaimed that immigration officers could not "disregard the fundamental principles that inhere in 'due process of law.'"[104] However, procedural due process claims at that time faced an extremely high bar of having to show "manifest unfairness."[105] Presently, the Fifth and Fourteenth Amendments are understood to be the sources of noncitizens' entitlement to procedural due process. [106] In essence, due process now means that removal proceedings must be fundamentally fair.[107] A paramount aspect of fairness is that noncitizens are entitled to have "a full and fair hearing,"[108]

100. Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1032 (2010) (discussing Gonzalez-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) and Orhorhaghe v. INS, 38 F.3d 488, 492 (9th Cir. 1994)).

101. Puc-Ruiz v. Holder, 629 F.3d 771, 779 (8th Cir. 2010) (citing Almeida-Amaral v. Gonzales, 461 F.3d 231, 236 (2d Cir. 2006)).

102. *Lopez-Mendoza*, 468 U.S. at 1050 ("Our conclusions concerning the exclusionary rule's value might change, if there developed good reason to believe that Fourth Amendment violations by INS officers were widespread."). Indeed, a case has been made that the application of the exclusionary rule in removal proceedings should be revisited both because Fourth Amendment violations have become widespread, and because of fundamental changes in immigration enforcement that have occurred since *Lopez-Mendoza* was decided in 1984. *See generally* Stella Burch Elias, *"Good Reason to Believe": Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting* Lopez-Mendoza, 2008 WIS. L. REV. 1109.

103. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1628 (1992).

104. Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 100 (1903).

105. *See, e.g.*, Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912).

106. Matter of M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011) (citing Reno v. Flores, 507 U.S. 292, 306 (1993)); Mathews v. Diaz, 426 U.S. 67, 77 (1976).

107. Tashnizi v. INS, 585 F.2d 781, 782 (5th Cir. 1978); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 505 (BIA 1980); Matter of Lam, 14 I&N Dec. 168, 170 (BIA 1972); *see also* Kanstroom, *supra* note 21, at 633–34 ("There is no question that aliens in deportation proceedings are entitled to due process, and the touchstone in this setting is 'fundamental fairness.'").

108. Matter of M-A-M-, 25 I&N Dec. 474, 479 (BIA 2011) (citing Matter of M-D-, 23 I&N Dec. 540, 542 (BIA 2002)).

such that they have "the opportunity to be heard at a meaningful time and in a meaningful manner."[109]

B. Criminalization of Removal Proceedings

There is increasing recognition of the overlap between criminal and immigration law. The overlap tracks the false specter of the "criminal alien" in mainstream representations of immigrants, including former President Trump's references to Mexican immigrants in this manner: "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people."[110] While data has long and consistently contradicted this false narrative that immigrants commit, and/or are convicted of, crimes more often than other populations,[111] the criminalization trend continues nonetheless.

Increasing criminalization of noncitizens calls for incorporating more stringent procedural protections into immigration proceedings. While in *some* cases criminal proceedings already occurred prior to removal proceedings and noncitizens therefore may not have a viable argument regarding self-incrimination, criminal proceedings also may be ongoing or even occur after removal proceedings. It is therefore critical to understand the intersections of these two systems of enforcement in order to most fully preserve noncitizens' right against self-incrimination.

The Supreme Court has reflected that "deportation is . . . intimately related to the criminal process," yet the high court has never gone so far as to say that deportation is a punishment for crime.[112] This has led numerous jurists and scholars to scrutinize the "civil" categorization of immigration

109. Brue v. Gonzales, 464 F.3d 1227, 1233 (10th Cir. 2006) (citing Schroeck v. Gonzales, 429 F.3d 947, 952 (10th Cir. 2005)).

110. Donald Trump, Presidential Bid Announcement Speech (June 16, 2015), *in Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015, 2:32 PM), https://time.com/3923128/donald-trump-announcement-speech/ [https://perma.cc/NP7M-DKVY].

111. Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, THE MARSHALL PROJECT (May 13, 2019), https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime [https://perma.cc/62M9-7UES]; Alex Nowrasteh, *Illegal Immigrants and Crime – Assessing the Evidence*, CATO INST. (Mar. 4, 2019, 1:16 PM), https://www.cato.org/blog/illegal-immigrants-crime-assessing-evidence [https://perma.cc/N3SC-AVND]; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, CTR. FOR AM. PROGRESS (Jan. 26, 2017, 1:00 AM), https://www.americanprogress.org/issues/immigration/reports/2017/01/26/297366/the-effects-of-sanctuary-policies-on-crime-and-the-economy [https://perma.cc/9STD-U4GE]; Rubén G. Rumbaut & Walter A. Ewing, *The Myth of Immigrant Criminality*, SOC. SCI. RSCH. COUNCIL (May 23, 2007), https://items.ssrc.org/border-battles/the-myth-of-immigrant-criminality [https://perma.cc/P7QE-NM86]; Matthew T. Lee, Ramiro Martinez, Jr. & Richard Rosenfeld, *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOCIO. Q. 559, 560, 571–74 (2001).

112. Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

proceedings. For example, Justices Brewer, Field, and Fuller wrote dissents in the *Fong Yue Ting* case, stating outright their opinion that deportation constitutes punishment.[113]

Scholar Stephen Legomsky has explained that, in determining deportation is not equivalent to "punishment," the Supreme Court failed to address other basic principles of criminal theory. [114] For example, the Supreme Court did not address the theory of incapacitation, even though deportation certainly constitutes "the isolation of the undesirable offender from society."[115] Deportation serves as deterrence for the same reason and serves as retribution when a person's legal status is revoked because they have been convicted of a crime.[116] Other scholars have also noted that the purposes of deportation, particularly for lawful permanent residents, are in line with deterrence, incapacitation, and retribution.[117]

Juliet Stumpf highlights the nature of the parties involved in order to demonstrate that removal proceedings are more similar to criminal proceedings than other types of civil proceedings. While civil litigation typically involves the regulation of behavior between private parties, criminal and immigration law regulate the relationship between the state and the individual.[118] More specifically, "[b]oth immigration and criminal law marshal the sovereign power of the state to punish and to express societal condemnation for the individual offender."[119]

Others have addressed the fact that the trappings of the immigration system bear a striking resemblance to the criminal justice system. [120] Noncitizens are subject to arrest for suspected immigration law violations, sometimes based on warrants that are issued by governmental actors. They are interrogated, during which time the law enforcement officers take a sworn statement. The government then issues a charging document, gives

113. Fong Yue Ting v. United States, 149 U.S. 698, 733, 759, 763 (1893) (Brewer, J., Field, J. & Fuller, C.J., dissenting). Justice Brewer eloquently stated this idea in his dissent in *Fong Yue Ting*:

> But the Constitution has potency everywhere within the limits of our territory, and the powers which the national government may exercise within such limits are those, and only those, given to it by that instrument. Now, the power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.

Id. at 738 (Brewer, J., dissenting).

114. Legomsky, *supra* note 10, at 514.

115. *Id.*

116. *Id.*

117. Ortiz Maddali, *supra* note 90, at 43–44.

118. Stumpf, *supra* note 11, at 379.

119. *Id.*

120. *See generally* Stumpf, *supra* note 11; Legomsky, *supra* note 10; Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281 (2010); Hernández, *supra* note 11.

formal notice to the noncitizen, and files the charges in court, which initiates removal proceedings.[121] Moreover, noncitizens may be detained while they await trial, as described *infra* in Section II.B.3.

Additionally, the seemingly ever-increasing immigration consequences of criminal convictions, increasing prosecution of federal criminal cases pertaining to immigration violations, and increasing use of detention are all indicative of the criminalization of civil removal proceedings.

1. Immigration Enforcement Programs

The role of local law enforcement in cooperating with the federal government to effectuate immigration enforcement—specifically through the officers and technology of the criminal system—bears mentioning. Two main programs have garnered attention: 287(g) and Secure Communities. Named for the section of the immigration statute, the 287(g) program deputizes local law enforcement to carry out the functions of federal immigration officials.[122] ICE describes 287(g) agreements as "mutually beneficial agreements [that] allow state and local officers to act as a force multiplier in the identification, arrest, and service of warrants and detainers of incarcerated foreign-born individuals with criminal charges or convictions."[123] As of January 2021, ICE has 287(g) agreements with 148 law enforcement agencies.[124]

As opposed to 287(g), which grants immigration enforcement powers to local law enforcement officers, the Secure Communities program is an information-sharing technology where fingerprints obtained by any law enforcement agency are automatically sent to DHS.[125] Secure Communities was in effect from 2008 until it was suspended during the Obama administration in 2014, and then reinstated during the Trump administration on January 25, 2017.[126] ICE proclaims that Secure Communities has led to the removal of "over 363,400 criminal aliens from the U.S."[127]

Violeta R. Chapin has thoroughly explained the criticisms lodged, even by law enforcement officials, regarding the efficacy of 287(g) and Secure

121. 8 U.S.C. § 1229(a) (service of Notice to Appear); § 1229a (role of immigration judge and conduct of removal proceedings).

122. Chapin, *supra* note 24, at 120.

123. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/287g (last updated Jan. 21, 2021) [https://perma.cc/E67L-MBUR].

124. *Id.*

125. *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/secure-communities (last updated Jan. 7, 2021) [https://perma.cc/67UF-3TWL].

126. *Id.*

127. *Id.*

Communities.[128] Local police officers and sheriffs have voiced their concerns that increased cooperation with federal immigration enforcement endangers communities because immigrants are less likely to report crimes out of fear that they will be taken into custody themselves.[129] They have also raised concerns that adding immigration enforcement duties would increase racial profiling and would also impose too big of a burden on local law enforcement budgets.[130] Nonetheless, these programs not only continue, but constitute a major aspect of the criminalization of immigration.

2. Increased Penalties for Criminal Convictions

Once placed in removal proceedings, criminal convictions have a significant impact on the outcome of a person's case. Regardless of the Supreme Court's stance that deportation is not "punishment," the Court has long recognized, nonetheless, that deportation is often a *penalty* that flows directly from criminal activity.[131] In fact, in *Padilla v. Kentucky*, the Court acknowledged that a person may well see deportation as "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[132]

The sheer number of removal cases involving people with criminal convictions shows the overlap between the criminal and immigration enforcement systems. The Department of Homeland Security (DHS) specifically collects data regarding the number of noncitizens removed who have criminal convictions. In 2017, removals of "non-criminals" (174,063) outnumbered removals of "criminals" (121,301),[133] as they have every year since 2004.[134] According to a Pew Research report, arrests of people with no prior criminal convictions rose 146% from 2016 to 2017.[135] Even DHS's proclamation that 121,301 "criminals" were removed obscures some of the truth in that it may play on stereotypes and harmful rhetoric regarding

128. Chapin, *supra* note 24, at 144–57.

129. *Id.* at 123, 148.

130. *Id.* at 148.

131. Kanstroom, *supra* note 21, at 606 n.39 ("[Deportation] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted." (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945))).

132. Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

133. *Table 41. Aliens Removed by Criminal Status and Region and Country of Nationality: Fiscal Year 2017*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/yearbook/2017/table41 (last updated Apr. 9, 2019) [https://perma.cc/LUF3-2QWG].

134. *See Yearbook of Immigration Statistics*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/yearbook# (last updated Jan. 6, 2020) [https://perma.cc/MGJ5-M4U5].

135. Kristen Bialik, *Most Immigrants Arrested by ICE Have Prior Criminal Convictions, a Big Change from 2009*, PEW RSCH. CTR. (Feb. 15, 2018), https://www.pewresearch.org/fact-tank/2018/02/15/most-immigrants-arrested-by-ice-have-prior-criminal-convictions-a-big-change-from-2009 [https://perma.cc/8JRH-FLCT].

immigrants. People reviewing that data might presume that these "criminals" were convicted of rape, murder, or other violent crimes. To the contrary, 29.2% (35,385 people) of the "criminal aliens" removed in 2017 had been convicted of immigration-related crimes such as illegal entry or reentry.[136] 14.5% of the "criminals" were in the category "Traffic Offenses," which includes driving under the influence and lesser traffic crimes such as driving without insurance.[137]

In *Padilla v. Kentucky*, the United States Supreme Court summarized changes in immigration law that led to the contemporary intimate relationship between criminal convictions and deportation.[138] The Court noted that, over the last century, classes of deportable offenses broadened vastly while the authority of criminal court judges to exercise their discretion to halt deportations through a procedure called a judicial recommendation against deportation (JRAD) shrank and then disappeared.[139]

More recently, the various Attorneys General (AG) during the Trump administration accelerated the practice of referring cases to themselves in order to create binding precedent.[140] These decisions have expanded the immigration consequences for criminal convictions. One example is the *Matter of Castillo-Perez*, where the AG decided that two or more convictions for driving under the influence (DUI) during the statutory period would presumptively indicate that the person lacks good moral character, and that evidence of rehabilitation is insufficient to overcome the presumption.[141] Thus, two DUIs, even of a non-aggravated nature, would result in a denial of relief.

3. Proliferation of Civil Immigration Detention

Along with increased enforcement and penalties for convictions comes increased use of detention. Scholars have noted that the fact that people are

136. KATHERINE WITSMAN, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2017, at 13 (2019), https://www.dhs.gov/sites/default/files/publications/enforcement_actions_2017.pdf [https://perma.cc/3YZX-HAYJ].

137. *Id.* See Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879 (2015), for a discussion of how states have used driver's license schemes to punish undocumented status.

138. Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

139. *Id.* at 360–63.

140. The referral authority was rarely used; for example, the Obama administration used the authority four times in eight years, yet the Trump administration had already used referral authority twelve times within the first three years. Brittany Stevenson, *Building Legal Walls: Limiting Attorney General Referral Authority over Immigration Cases*, 81 OHIO ST. L.J. 315, 317 (2020).

141. Matter of Castillo-Perez, 27 I&N Dec. 664, 665 (A.G. 2019).

physically confined during removal proceedings exposes the punitive nature of immigration detention.[142]

The phrase "immigrant detention" encompasses for-profit private detention centers run by ICE nationwide, as well as prisons and jails that incarcerate civil immigration detainees along with people in criminal custody.[143] In the 1980s, less than 2,000 people were held in detention.[144] By 2019, the number rose to an average of 50,165 people.[145] And for fiscal year 2021, ICE sought $4.1 billion for the detention system with the goal of expanding capacity to 60,000 people detained every day.[146] ICE's stated mission is to "expand aggressive interior enforcement within the United States, double the use of family detention, apply more stringent application of parole criteria to people eligible for release from detention, and reenroll more non-citizen records in the National Crime Information Center . . . database, which will result in more immigrants being referred to ICE through the criminal justice system."[147] The use of private detention centers in particular has also expanded under the current administration, with the opening of over forty new immigration detention centers since 2017.[148]

Moreover, these rising numbers of people in detention reflect other systemic practices contributing to prolonged detention. As noted by Justice Breyer, noncitizens today might spend from 305 days to four years in ICE custody before ultimately winning their cases.[149] Some noncitizens are subject to mandatory detention if they have "committed" (as opposed to being convicted of) certain offenses listed in various subsections of the immigration statute.[150] These offenses can include crimes like "shoplifting, petty theft, drunk driving, and even low-level drug violations."[151]

142. *See, e.g.*, Jennifer M. Chacón, *Immigration Detention: No Turning Back?*, 113 S. ATL. Q. 621, 623 (2014) ("The glaring problem with the legal doctrine that constructs immigration detention as nonpunitive is that it is a fiction. Detention is punitive, and it is experienced as such by immigrants."); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1349–50 (2014) ("Whatever the actual reason for detention and despite immigration detention's legal characterization as civil, individuals in immigration confinement are frequently perceived to be no different than individuals in penal confinement.").

143. ACLU, JUSTICE-FREE ZONES: U.S. IMMIGRATION DETENTION UNDER THE TRUMP ADMINISTRATION 14 (Apr. 2020), https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf [https://perma.cc/M7MY-584H] [hereinafter ACLU REPORT].

144. *Id.*

145. U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., BUDGET OVERVIEW: FISCAL YEAR 2021, at 6 (2020), https://www.dhs.gov/sites/default/files/publications/u.s._immigration_and_customs_enforcement.pdf [https://perma.cc/R8M4-EQHP].

146. ACLU REPORT, *supra* note 143, at 16.

147. *Id.* at 17.

148. *Id.* at 14.

149. Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting).

150. 8 U.S.C. § 1226(c).

151. Jorge A. Solis, *Detained Without Relief*, 10 ALA. C.R. & C.L. L. REV. 357, 371 n.85 (2019).

Increasing bond amounts also contribute to noncitizens' prolonged detention. Syracuse University's Transactional Records Access Clearinghouse, which has tracked bond amounts, reported that bonds set by immigration judges were all under $2,000 in 2005, yet 40% of bonds in 2018 were $10,000 or more.[152]

Remaining in detention during the pendency of removal proceedings affects every aspect of a noncitizen's case. While a noncitizen is detained, they cannot be gainfully employed, nor can they obtain documentation from outside sources that is necessary for their case. Notably, being detained may affect a person's ability to hire a lawyer.[153] Thus, for people who do not have family members to advocate for them, it is exceedingly difficult to win their cases.[154]

The proliferation of immigration detention highlights its punitive nature and further exemplifies the necessity of expanding procedural protections.

4. Federal Immigration Crimes

Another trend demonstrating the criminalization of immigration is the increasing criminal prosecution of noncitizens for immigration-related violations. Unauthorized entry became a crime at the behest of Senator Coleman Livingston Blease in 1929.[155] Blease, a notorious white supremacist,[156] sought to turn the civil offense of unlawful entry into the country into a misdemeanor, and reentry to the U.S. following a prior deportation into a felony.[157] The plan was strategic in continuing to permit lawful Mexican immigrants to provide cheap labor in the fields, while permitting the U.S. to cut off the flow at ports of entry as needed.[158] Blease's

152. Stef W. Kight & Felix Salmon, *The Cost of Bail for Immigrants Is Surging*, AXIOS (Jul. 21, 2019), https://www.axios.com/immigrant-bail-bonds-costs-rising-ice-judges-2e3a06b6-9802-4157-a282-ac9e9587a10d.html [https://perma.cc/T9Q6-AM2U].

153. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015) (finding that, between 2007 and 2012, 14% of detained noncitizens, as opposed to 66% of nondetained noncitizens, were represented by counsel).

154. In one study, nondetained noncitizens were nearly five times as likely to win their cases if they had counsel. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, ACCESS TO COUNSEL IN IMMIGRATION COURT 3 (2016), http://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/D9GZ-45EP].

155. Kelly Lytle Hernandez, *How Crossing the US-Mexico Border Became a Crime*, THE CONVERSATION (Apr. 30, 2017, 10:00 PM), https://theconversation.com/how-crossing-the-us-mexico-border-became-a-crime-74604 [https://perma.cc/3UBD-C2XD].

156. Blease preached the superiority of white men, opposed education for people of color, and was a proponent of lynching as a manner of controlling African American men. Bryant Simon, *The Appeal of Cole Blease of South Carolina: Race, Class, and Sex in the New South*, 62 J.S. HIST. 57, 82–83 (1996).

157. Hernandez, *supra* note 155.

158. *Id.*

bill, the Immigration Act of 1929, passed and became Sections 1325 and 1326 of Title 8 of the U.S. Code.[159]

Section 1325 currently criminalizes the following:

> "Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . ."[160]

The penalties associated with these entries or attempts to enter are a fine and up to six months imprisonment for the first offense, and a fine and up to two years' imprisonment for subsequent offenses.[161]

Section 1326 prohibits unlawful reentry of noncitizens previously removed. In essence, a noncitizen who "has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding" is subject to federal criminal prosecution if they enter, attempt to enter, or are discovered to be present anywhere inside the United States.[162] The penalty for illegal reentry under § 1326(a) is a fine or no more than two years of imprisonment.[163] However, there are heightened penalties of up to twenty years of imprisonment if the person was convicted of certain crimes before being removed.[164]

Prosecutions of federal immigration violations, most notably illegal entry, reentry, and alien smuggling, are on the rise.[165] Prosecutions for immigration offenses overshadow other types of federal offenses. In 2019, immigration-related prosecutions comprised 38.4% of all people sentenced under the U.S. Sentencing Guidelines,[166] and drug-related prosecutions

159. Constance Nyers, *Should the U.S. Repeal 8 U.S.C. § 1325?*, 41 U. LA VERNE L. REV. 30, 34–35 (2019).

160. 8 U.S.C. § 1325(a).

161. *Id.*

162. 8 U.S.C. § 1326(a).

163. *Id.*

164. *See* 8 U.S.C. § 1326(b)(2).

165. Failure to register is another federal crime, but it does not apply to millions of noncitizens, including undocumented immigrants and people who entered the United States in a nonimmigrant status. Nancy Morawetz & Natasha Fernández-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 141, 178–79 (2014). For an enlightening analysis of the history of registration requirements and compelling argument for their abandonment, see *id.*

166. U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2019, at 4 (Apr. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/YC2Z-G275]. The data includes people sentenced for alien smuggling, unlawfully entering or remaining in the U.S., trafficking

comprised 26.6% of those sentenced.[167] Prosecutions of immigration offenses rose 22.9% from fiscal year 2018.[168] A press release from the Department of Justice Office of Public Affairs announced that "U.S. Attorneys' Offices prosecuted the highest number of immigration-related offenses since record keeping began more than twenty-five years ago."[169] The press release boasts 25,426 defendants accused of felony illegal reentry, 80,866 charged with misdemeanor improper entry, and 4,297 defendants charged with alien smuggling.[170] The announcement attributes the DOJ's self-proclaimed success to "restored essential partnerships with national, state and local law-enforcement partners."[171]

There have been calls to decriminalize both illegal entry and illegal reentry. For example, in the Democratic primaries leading up to the 2020 presidential election, several presidential hopefuls, including Julián Castro, Elizabeth Warren, and Pete Buttigieg, endorsed the idea of striking Section 1325 in its entirety.[172] One of the rationales for decriminalizing is that the Trump administration has relied on the fact that migrant parents are prosecuted to justify separating them from their children, who are not allowed in criminal custody.[173] Additionally, then-California Attorney General Xavier Becerra has stated that enforcing the civil laws by imposing civil penalties is sufficient for people who cross the border without authorization because "[t]hey haven't committed a crime against someone, and they are not acting violently or in a way that's harmful to people."[174] Scholars have also called for decriminalization of border crossings.[175]

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in documents or making false or fraudulent statements related to immigration, and acquiring fraudulent documents. *Id.* at 12 n.10. Offenders identified as "Hispanic" made up 96.4% of those prosecuted for immigration-related crimes. *Id.* at 6.

167. *Id.* at 4.

168. *Id.* at 12.

169. Press Release, Dep't of Just., Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year [https://perma.cc/8CH8-2WP5].

170. *Id.*

171. *Id.*

172. Caitlin Dickerson, *Some Democrats Want to Decriminalize Illegal Border Crossings. Would It Work?*, N.Y. TIMES (July 31, 2019), https://www.nytimes.com/2019/07/31/us/border-crossing-decriminalization.html [https://perma.cc/8HDX-ZKT6].

173. *Id.*

174. Roque Planas & Angelina Chapin, *California's Attorney General Says Immigration Should Be Decriminalized*, HUFFINGTON POST (Apr. 3, 2019), https://www.huffpost.com/entry/california-attorney-general-xavier-becerra-immigration-decriminalized_n_5ca38787e4b0c32979610abc?utm_source=reddit.com [https://perma.cc/H25Z-8XMX].

175. *See, e.g.*, Victor C. Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J. 273, 299–301 (2010). See also the discussion of various scholars' proposals described in Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 2010–12 (2020).

III. ASPECTS OF THE SELF-INCRIMINATION ANALYSIS IN THE IMMIGRATION CONTEXT

In order to explore the application of the right against self-incrimination in immigration cases, it is first important to understand how the removal process functions. Removal proceedings consist of distinct stages.[176] Immigration courts are administrative courts that are part of the executive branch, under the umbrella of the Department of Justice.[177] DHS first files a Notice to Appear with the Executive Office for Immigration Review (EOIR) in order to initiate proceedings against a noncitizen.[178] After a decision is rendered in immigration court, an appeal may be made to the Board of Immigration Appeals (BIA), a reviewing body that decides appeals in removal and bond proceedings, as well as other related proceedings such as disciplinary cases against legal representatives.[179] The BIA may choose to make a decision that is binding nationwide,[180] or it may certify a case for review by the Attorney General.[181] The federal circuit courts have jurisdiction to review BIA decisions where cases involve constitutional questions or questions of law.[182] A noncitizen (or the government) may file a writ of certiorari to the Supreme Court following the decision of the federal circuit court.

The next section explores how scenarios concerning potential self-incrimination arise and why the noncitizen's incentive to plead the Fifth varies depending on the context.

A. General Rules on Self-Incrimination in Removal Proceedings

As in other civil proceedings, noncitizens in immigration court may choose not to testify in response to "any question he reasonably believe[s] might have a tendency to incriminate him or furnish proof of a link in a

176. 8 U.S.C. §§ 1229, 1229a (each describing nature of removal proceedings); 8 C.F.R. § 239.1 (2020) (procedures related to issuance and service of notice to appear for removal proceedings).

177. The fact that the immigration courts and BIA are in the prosecutorial branch of the government has been widely criticized, including by immigration judges. *See, e.g.*, Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3 (2008).

178. 8 C.F.R. § 1003.14.

179. 8 C.F.R. § 1003.1(b).

180. 8 C.F.R. § 1003.1(d)(1).

181. 8 C.F.R. § 1003.1(h).

182. "Nothing in [the other statutory provisions] which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D).

chain of evidence."[183] Thus, testimony may not be taken if the noncitizen has a valid claim of self-incrimination.[184]

However, as with defendants in criminal proceedings, noncitizens' silence can be rendered unprivileged if the immigration judge compels them to testify, meaning that the witness may be ordered to answer a question or be held in contempt. A noncitizen may be compelled to testify regardless of their "mental capacity, language skills, or general competence."[185] One scenario in which the immigration judge can compel testimony, despite an assertion of the right against self-incrimination, is where there is an offer of immunity.[186] However, the DHS attorney or the immigration judge lack the authority to offer immunity; rather, immunity must be offered by the Attorney General or officers designated by them.[187] An obvious gap in this type of immunity that could cause problems later for the noncitizen is that the Attorney General cannot immunize someone from being prosecuted under state or local criminal laws.

Absent a court order compelling a noncitizen to testify, there is still a disincentive to remain silent in immigration court because there are direct negative consequences—specifically, the potential of an adverse inference.

As in other civil proceedings, there is no prohibition on immigration judges drawing an adverse inference when a noncitizen chooses to plead the Fifth during court.[188] The Immigration Judge Benchbook, citing Supreme Court, Ninth Circuit, and BIA cases, describes the potential effect of an adverse inference after being confronted with evidence: "Even if the refusal to testify is based on the Fifth Amendment privilege against self-incrimination, the refusal forms the basis of an inference and such inference is evidence."[189]

Another way of articulating how adverse inferences work was stated in a case where the respondent refused to testify regarding whether he was a member of the Communist Party, after the government presented a prima

183. Matter of Carrillo, 17 I&N Dec. 30, 33 (BIA 1979) (citing Matter of R-, 4 I&N Dec. 720, 721 (BIA 1952)).

184. Matter of Laqui, 13 I&N Dec. 232, 234 (BIA 1969), *aff'd*, Laqui v. INS, 422 F.2d 807, 809–10 (7th Cir. 1970).

185. N.Y. IMMIGR. REPRESENTATION, ACCESSING JUSTICE II: A MODEL FOR PROVIDING COUNSEL TO NEW YORK IMMIGRANTS IN REMOVAL PROCEEDINGS 7 (Dec. 2012), https://law.yale.edu/sites/default/files/area/center/liman/document/nyirs_reportii.pdf [https://perma.cc/ST2G-26SK]; *see also* Careen Shannon, *Immigration Is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 U. D.C. L. REV. 165, 173 (2014).

186. *Carrillo*, 17 I&N Dec. at 33.

187. *Id.*

188. U.S. *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 154 (1923) ("There is no provision which forbids drawing an adverse inference from the fact of standing mute.").

189. EXEC. OFF. OF IMMIGR. REV., IMMIGRATION JUDGE BENCHBOOK: EVIDENCE 21 (2007), https://www.justice.gov/eoir/page/file/988046/download [https://perma.cc/6HLM-2WNH] [hereinafter IMMIGRATION JUDGE BENCHBOOK].

facie case of deportability: "What then is the logical conclusion to be drawn from the silence of one who claims his answer may subject him to possible prosecution or punishment for violation of a Federal law? Our reading of the authorities reveals the inference is that the testimony withheld would be adverse to the interests of the person claiming the privilege."[190] Thus, the noncitizen's silence led to an inference of guilt.

The lesson here is that, when a person chooses to remain silent in the face of evidence of alienage, removability, or circumstances of their entrance to the United States, the immigration judge is empowered to draw adverse inferences, which then will likely lead to a finding of deportability or denial of relief.[191]

B. Testimonial Pitfalls in Immigration Court Hearings

Self-incrimination is at issue in two different ways during immigration proceedings. First, a noncitizen may be asked to testify about facts relating to their immigration status,[192] which could lead to new criminal charges for violations where the individual's "alien" status is a necessary component of the crime. Second, a noncitizen may be asked to testify about alleged criminal conduct—unrelated to immigration status—in a pending criminal case, or in such a way that raises the possibility of future criminal prosecution.[193]

Allocation of the burden of proof has a heavy bearing on whether it is in the noncitizen's interest to "plead the Fifth," because sometimes the benefits of staying silent often do not outweigh the benefits of speech. This is particularly true for noncitizens who lack legal status. Where a party bears the burden of proof, invocation of the Fifth Amendment does not relieve that party of the burden.[194] For example, where a noncitizen is required to show eligibility for relief,[195] there is no incentive to remain silent because a lack of evidence will result in the denial of relief. But where a lawful permanent resident is charged with removability, the government bears the burden of proving by clear and convincing evidence that the person is

190. Matter of O-, 6 I&N Dec. 246, 249 (BIA 1954).

191. Matter of Guevara, 20 I&N Dec. 238, 241–42 (BIA 1991) (collecting cases holding that adverse inferences may be drawn from silence).

192. Matter of Barcenas, 19 I&N Dec. 609, 610–11 (BIA 1988) (admitting respondent's statements regarding alienage and deportability against Barcenas' invocation of the Fifth Amendment and argument that his statements were not voluntary and were made in a coercive environment).

193. *See, e.g.*, Gutierrez v. Holder, 662 F.3d 1083, 1085–86 (9th Cir. 2011).

194. The Supreme Court has held that two corporations that refused to produce documents pursuant to the right against self-incrimination did not shift the burden of producing evidence to the government. ABA TREATISE, *supra* note 48, at 25 (citing United States v. Rylander, 460 U.S. 752, 758 (1983)).

195. Matter of Y-, 7 I&N Dec. 697, 699 (BIA 1958).

deportable as charged.[196] Thus, the noncitizen may have an incentive to exercise their Fifth Amendment right because their silence cannot be used against them if the government has not submitted its own proof.[197] Given complicated schemes of shifting burdens of proof depending on the type of hearing, this problem arises frequently in immigration court and applies differently in various situations.

1. Testimony Relating to Immigration Status

In all removal proceedings, the government bears the initial burden of establishing alienage.[198] However, a noncitizen's own testimony is sufficient to prove alienage, and the taking of such testimony has been held to not violate due process.[199] Agency regulations specifically provide that the respondent (who is always the noncitizen) can admit the factual allegations and removability and the immigration judge "may determine that removability as charged has been established by the admissions of the respondent," except that the judge may not accept admissions from unrepresented respondents who are incompetent or under the age of 18 without the presence of "an attorney or legal representative, a near relative, legal guardian, or friend."[200]

The fact that noncitizens are casually and frequently asked about their immigration status, without any sort of warning with respect to self-incrimination, is troubling because alienage is an element of various federal criminal statutes. For example, only "aliens" can be convicted of illegal entry and reentry.[201] One of the elements in the Ninth Circuit's Model Criminal Jury Instructions for illegal reentry is that "the defendant was an alien at the time of reentry," which is defined as "a person who is not a natural-born or naturalized citizen of the United States."[202] Thus, alienage is obviously a link in the chain of evidence proving the federal immigration crimes of illegal entry and reentry. Immigration judges have to ascertain the

196. 8 U.S.C. § 1229a(c)(3)(A); 8 C.F.R. § 1240.8(a) (2020).

197. *See, e.g.*, Duvall v. Att'y Gen. of U.S., 436 F.3d 382 (3d Cir. 2006) (describing deportation proceedings of a lawful permanent resident who asserted her right against self-incrimination with respect to place of birth and citizenship). The government's other evidence was ruled inadmissible and the immigration judge therefore terminated proceedings due to the government's failure to meet its burden. *Id.*

198. 8 C.F.R. § 1240.8(a) (burden is on the government to prove "by clear and convincing evidence that the respondent is deportable as charged"); 8 C.F.R. § 1240.8(c) (burden is on the government to "first establish the alienage of the respondent" before shifting burden to the noncitizen).

199. Matter of Laqui, 13 I&N Dec. 232, 234 (BIA 1969), *aff'd*, Laqui v. INS, 422 F.2d 807, 809–10 (7th Cir. 1970).

200. 8 C.F.R. § 1240.10(c).

201. 8 U.S.C. § 1325(a); 8 U.S.C. § 1326(a).

202. *See, e.g.*, NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 9.6 (2020) (listing three elements that the government must prove).

likelihood that the person could actually be prosecuted, including consideration of the statute of limitations.[203] And, given the data discussed above showing rising numbers of federal prosecutions over recent years, it is realistic to expect prosecution of federal immigration-related crimes if the five-year statute of limitations has not expired.[204]

Both the initial interrogation, which is akin to a pretrial interrogation in the criminal context, and the court hearing itself can present highly coercive circumstances, particularly where the noncitizen is pro se.[205] These problems are amplified due to the power dynamics inside courtrooms, especially where a noncitizen is unrepresented and not even aware of their right against self-incrimination to begin with.

a. In-Court Testimony

During court, DHS often easily meets its burden of establishing alienage because it is permitted to question the noncitizen directly.[206] In some circumstances, the immigration judge may ask the questions. There is a combination of two questions that generally can establish alienage: "Are you claiming U.S. citizenship?" and "Where were you born?"[207] Once answered, the government's initial burden is met and the burden shifts to the noncitizen to justify their presence in the United States or otherwise seek relief.[208]

Noncitizens may have a strong interest in choosing to remain silent in response to such questioning. As in other civil proceedings, the witness's silence alone is insufficient for the government to prove its case. In *Matter of Guevara*, the respondent refused to answer any questions that did not pertain to his identity, claiming his privilege against self-incrimination.[209] The Government had only submitted into evidence the Order to Show Cause, which contained allegations, but did not submit any other evidence

203. Hoffman v. United States, 341 U.S. 479, 486 (1951).

204. 18 U.S.C. § 3282(a) (providing general federal statute of limitations, which applies to all non-capital offenses, is five years from the date the offense was committed). It remains to be seen whether rates of criminal prosecutions of immigration law violations will change under the Biden Administration. While President Biden has pledged to "end[] the prosecution of parents for minor immigration violations as an intimidation tactic" during his first 100 days, that is a rather limited statement, and he has not indicated that he would otherwise scale back criminal prosecutions. *See The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN HARRIS, https://joebiden.com/immigration [https://perma.cc/QR2Q-ZSNT].

205. Chan, *supra* note 22, at 298; *see also* Miranda v. Arizona, 384 U.S. 436, 448 (1966) ("[C]oercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." (quoting Blackburn v. State of Alabama, 361 U.S. 199, 206 (1960))).

206. Matter of Carrillo, 17 I&N Dec. 30, 32 (BIA 1979).

207. This is based on the author's own observations while representing noncitizens in immigration court hearings. *See also* Chan, *supra* note 22, at 293.

208. 8 C.F.R. § 1240.8(c) (2020).

209. Matter of Guevara, 20 I&N Dec. 238, 239 (BIA 1991).

regarding the respondent's place of birth, changes of status, or any other information required to shift the burden to the respondent.[210] The BIA held that, because the Government bore the burden of proof in deportation proceedings to establish alienage, "the respondent's silence alone does not provide sufficient evidence, in the absence of any other evidence of record at all, to establish a prima facie case of alienage."[211]

Additionally, because DHS bears the burden of proving alienage, the noncitizen simply may wish to put the government to its proof. This is particularly so where the noncitizen is not eligible for any forms of relief, or where constitutional violations led to the attainment of the evidence. In those instances, the noncitizen is entitled to challenge the violation in court, either by filing a motion to suppress the evidence or a motion to terminate the proceedings entirely.[212]

However, the attempt to refuse to speak may not be fruitful in practice, because relevant information may have been obtained before coming to court, which is discussed in the next section.

b. Pre-Removal Proceeding Interrogations/Encounters

Although the focus of this Article is on the right against self-incrimination within the immigration court setting, a discussion of noncitizens' rights during interrogations that occur prior to the commencement of removal proceedings is warranted because the evidence may later be introduced in court. This issue may arise during border stops, scenarios treated like border stops, or when a person is apprehended by the Department of Homeland Security following a criminal arrest or otherwise.

Pre-removal proceeding interrogations are not subject to the same, albeit limited, protections as criminal pretrial interrogations.[213] Some warnings are required when a person is arrested without a warrant. The person must be: (1) told the reasons for the arrest, (2) told their right to be represented at no cost to the government, (3) advised that any statement made may be used against them in a future proceeding, and (4) given a list of free legal services.[214] Yet, *Miranda* warnings are not required, even in circumstances

210. *Id.* at 244.

211. *Id.* at 242.

212. AM. IMMIGR. COUNCIL, MOTIONS TO SUPPRESS IN REMOVAL PROCEEDINGS: A GENERAL OVERVIEW (2017), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/motions_to_suppress_in_removal_proceedings_a_general_overview.pdf [https://perma.cc/NYC4-2PTD].

213. For an in-depth discussion of this topic, see Chan, *supra* note 22.

214. 8 C.F.R. § 287.3(c) (2020).

where the lack of warnings would render the statements inadmissible in criminal court.[215]

A recent decision from the Washington Supreme Court indicates a potential change, at least in that jurisdiction, in the scope of *Miranda*'s application in pre-removal proceeding interrogations. In *State v. Escalante*, the Washington Supreme Court recognized that questioning at the border is typically not "custody" for *Miranda* purposes, yet stated:

> Escalante was separated from the normal stream of traffic and routed to a secondary inspection area, which would cause a reasonable person to feel subject to an increased level of suspicion. At secondary, agents separated him from all his belongings, confiscated his documents, subjected him to a pat-down search, and detained him for five hours in a locked 11 x 14 foot lobby that was inaccessible to the public or other travelers. . . . Escalante was not allowed to leave the lobby or to freely use the bathroom or access water.[216]

The court held that these particular facts during Escalante's border detention constituted an "inherently coercive environment that demands *Miranda* warnings to ensure an individual's choice to speak is the product of free will" and that Escalante was in custody when he was interrogated.[217] *Escalante* further highlights the intensively fact-dependent inquiry in which courts engage to determine whether an interrogation was "custodial." While this case represents a positive shift toward protecting the rights of noncitizens, it is unclear whether other jurisdictions will follow suit.

Part of these pre-removal proceedings encounters involves the preparation of certain documents. Before attempting to initiate removal proceedings, DHS must gather information to form the basis of the Notice to Appear, which charges the noncitizen as removable and provides factual allegations supporting the charges. Thus, during the initial encounter with a noncitizen, ICE officers conduct an interrogation and fill out the Form I-213, Record of Deportable/Inadmissible Alien.[218] The I-213 includes all biographical data, including information about place of birth and last entry to the United States, a photograph and fingerprints, criminal history, a

215. *See* United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) ("Although a lack of *Miranda* warnings might render his statements inadmissible in a criminal prosecution for violation of the immigration laws, the failure to give *Miranda* warnings did not render them inadmissible in deportation proceedings." (citing Chavez-Raya v. INS, 519 F.2d 397, 402 (7th Cir. 1975))).

216. State v. Escalante, 461 P.3d 1183, 1192 (Wash. 2020).

217. *Id.* at 1187.

218. It is not necessary that the noncitizen participate in the process of creating the Form I-213. For example, in *Findley*, the noncitizen had objected to the reliability of the I-213 because none of its information came from him and was largely based on hearsay from his relatives. Matter of Findley, 2017 WL 1130670, at *1 (BIA Jan. 31, 2017). The BIA noted that "the Federal Rules of Evidence do not apply in immigration proceedings, and hearsay is admissible." *Id.* at *3.

description of the encounter between ICE and the noncitizen, and any other information that the noncitizen divulges during the interrogation.[219] The I-213 is signed by the deportation officer who conducted the interrogation and constitutes an official record that is presumptively admissible later on in court, even though it is hearsay.[220]

Noncitizens may challenge the I-213, but the available challenges are limited. The BIA has held that Form I-213's are inherently trustworthy and admissible, unless the noncitizen can prove that it contains incorrect information, or the information was obtained by coercion or duress.[221] The Second Circuit has added that the I-213 can be admitted in removal proceedings without giving the noncitizen a chance to cross-examine the preparer because of the form's presumptive reliability, at least if no other evidence has been put forward to bring the contents of the I-213 into question.[222] In fact, the Supreme Court has noted that officers who prepare the I-213s "rarely must attend the hearing."[223] Moreover, if the noncitizen previously admitted alienage when pleadings were taken, any attempt to suppress that information will have been foiled. All of these factors make the likelihood of succeeding on a challenge to the I-213 very low.

2. Testimony Relating to Other Pending or Potential Criminal Charges

Noncitizens are also placed in a difficult position when asked to testify about criminal conduct, whether in federal or state court, and whether alleged or convicted. The concern with this type of testimony is that the prosecutor in the criminal case could obtain the testimony given in immigration court and use that in the criminal case or to initiate a new criminal case.[224] A first consideration is the status of the criminal case. For example, if the criminal case has concluded entirely, then there will generally be no Fifth Amendment right to silence because there is no danger

219. A sample Form I-213 is available on the Catholic Legal Immigration Network's website at: *Practitioners' Guide to Obtaining Release From Immigration Detention*, CLINIC (May 24, 2018), https://cliniclegal.org/resources/enforcement-and-detention/practitioners-guide-obtaining-release-immigration-detention [https://perma.cc/VGK4-CVAM].

220. Bauge v. INS, 7 F.3d 1540, 1543 (10th Cir. 1993); *Findley*, 2017 WL 1130670, at *1.

221. *Findley*, 2017 WL 1130670, at *1 (quoting Matter of Gomez-Gomez, 23 I&N Dec. 522, 524 (BIA 2002)); United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) (stating that lack of *Miranda* warnings did not render statements inadmissible in deportation proceedings, even if they may be inadmissible in criminal proceedings, unless coercion or other improper behavior was shown).

222. Felzcerek v. INS, 75 F.3d 112, 117 (2d Cir. 1996).

223. INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984).

224. It is common practice for federal prosecutors to obtain portions of immigration files in order to support charges for immigration-related offenses. Telephone Interview with Christina Sinha, Esq., Assistant Federal Public Defender (Apr. 15, 2020).

that the testimony will be used against the noncitizen.[225] However, if the criminal case concluded but is on appeal and may be remanded for a new trial, it is imperative that the right against self-incrimination be preserved. Additionally, some noncitizens may have criminal cases that simply have not resolved at all, such as where they are transferred to immigration detention before the conclusion of criminal proceedings. Lastly, noncitizens may have to weigh the possibility that they could be newly charged with a crime following immigration proceedings if their testimony implicates them in criminal activity.

For those who have pending charges, the possibility of a new trial, or potential future charges, one strategy available to the noncitizen is to ask for a lengthy continuance that would allow for the criminal investigation or proceeding to conclude prior to giving any testimony. However, the BIA has imposed significant limitations on motions to continue.[226] Where immigration judges previously could grant continuances for good cause, *Matter of L-A-B-R-* now imposes a two-part test in circumstances where the noncitizen is seeking resolution of a collateral matter: the noncitizen has to prove that (1) they are likely to receive the collateral relief, and (2) the collateral relief is material to the outcome of the removal proceedings.[227] Additionally, efforts to obtain lengthy continuances to resolve criminal proceedings may not be successful due to the imposition of stringent case quotas for immigration judges.[228] Continuances also may not be palatable from the perspective of the noncitizen, particularly those who are detained during the pendency of proceedings.

The incentives regarding whether to speak or not are oftentimes murky, particularly to a noncitizen proceeding pro se. On one hand, immigration judges treat speech that attempts to explain or rationalize criminal conduct as entirely irrelevant because guilt or innocence was decided by the criminal court and therefore is outside the purview of immigration court proceedings.[229] Yet, that is not always the case. For example, on making a determination of whether a crime qualifies as a "particularly serious crime" barring someone from asylum, "all reliable information may be considered

225. There must be "some tangible and substantial probability" that the testimony could lead to a conviction. Matter of R-, 4 I&N Dec. 720, 721 (BIA 1952).

226. Matter of L-A-B-R-, 27 I&N Dec. 405 (A.G. 2018).

227. *Id.* at 406.

228. Immigration judges are increasingly unwilling to grant continuances because they are subject to quotas, tight timelines to conclude cases, and have less discretion to manage their own dockets. Priscilla Alvarez, *Immigration Judges Quit in Response to Administration Policies*, CNN (Dec. 27, 2019, 6:39 AM), https://www.cnn.com/2019/12/27/politics/immigration-judges-resign/index.html [https://perma.cc/43P8-YYN8].

229. Matter of G-G-S-, 26 I&N Dec. 339, 345 (BIA 2014) ("We cannot go behind the decisions of the criminal judge and reassess any ruling on criminal culpability."), *vacated sub nom.* Gomez-Sanchez v. Sessions, 892 F.3d 985 (9th Cir. 2018).

in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction."[230] Noncitizens must choose, often without the benefit of advice from counsel, whether to potentially give damning testimony that could affect their criminal case or remain silent and risk an adverse inference in their removal hearing.

The REAL ID Act of 2005 placed the burden on the noncitizen to prove eligibility for relief from removal.[231] "Relief from removal" includes asylum, withholding of removal, relief under the Convention against Torture, adjustment of status, cancellation of removal, voluntary departure, and waivers of grounds of inadmissibility or deportability. If a noncitizen asserts that they were lawfully admitted, they must show that the admission was lawful by clear and convincing evidence.[232] Additionally, if a noncitizen with legal status is found deportable, the noncitizen bears the burden to establish eligibility for any relief sought.[233]

In situations where the burden is on the noncitizen, they must either answer any inquiries asked of them or risk the immigration judge drawing an adverse inference. In a case where the immigration judge refused to consider the respondent's application for discretionary relief because the respondent decided to remain silent, the BIA held that that was improper retaliation.[234] Nonetheless, an adverse inference about criminal conduct may be drawn, ultimately leading the immigration judge to deny relief because they refuse to exercise discretion favorably to the noncitizen who appears to be hiding something, even if they have a constitutional right to do so.[235] Another type of adverse inference may be drawn that establishes an element necessary to find a person deportable or statutorily ineligible for relief, resulting in deportation.[236]

Troublingly, in certain circumstances it appears that courts take silence as an outright admission of guilt, which is a step further than drawing an

230. Matter of N-A-M-, 24 I&N Dec. 336, 342 (BIA 2007).

231. 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d) (2020).

232. 8 U.S.C. § 1229a(c)(2)(B).

233. *See, e.g.*, Matter of S-Y-G-, 24 I&N Dec. 247, 251 (BIA 2007); Matter of Jean, 23 I&N Dec. 373, 386 (BIA 2002).

234. Singh v. Holder, 321 F. App'x 473, 480 (6th Cir. 2009) (citing Matter of Tsang, 14 I&N Dec. 294, 295 (BIA 1973)).

235. Invoking the right against self-incrimination may result in an alien failing to meet his or her burden of proof for discretionary relief. *See* Matter of Marques, 16 I&N Dec. 314, 316 (BIA 1977); *see also* Matter of Y-, 7 I&N Dec. 697, 699–70 (BIA 1958) (noncitizen not entitled to discretionary adjustment of status where he refused to testify concerning prior false claims); Matter of Li, 15 I&N Dec. 514, 515 (BIA 1975) (denying discretionary voluntary departure for refusal to answer certain questions).

236. *See, e.g.*, Matter of O-, 6 I&N Dec. 246, 248 (BIA 1954) (finding that, where government established a prima facie case of deportability, the respondent's silence permissibly led to an adverse inference that the respondent was a member of the Communist Party, a ground of deportability).

adverse inference after the government has provided probative evidence.[237] In *Gutierrez v. Holder*, the immigration judge asked the noncitizen whether he was driving on a suspended license, to which his attorney responded that Mr. Gutierrez was invoking his right to remain silent.[238] The immigration judge made a finding that "the respondent [was] currently still driving even on a suspended driver's license."[239] On his petition for review, the Ninth Circuit made a blanket statement that the immigration judge "was permitted to draw an adverse inference when Gutierrez refused to answer whether he was driving on a suspended license."[240] Thus, it appears that the court accepted that, even though there was no other evidence discussed regarding whether Mr. Gutierrez was driving on a suspended license at the time, Mr. Gutierrez's silence constituted an admission.

Another layer of this complex puzzle is that the standards set out by federal courts, including the Supreme Court, have been confused by the agency. As a prime example, in a 2017 case, the BIA applied a heightened standard by stating that the Fifth Amendment does not protect testimony unless such testimony would *unequivocally* subject the noncitizen to criminal prosecution:

> [C]ompelling a person to answer a question in a removal proceeding regarding where he was born does not violate the Fifth Amendment's protection against self-incrimination because the question is too attenuated to whether someone entered the United States illegally in order that he could be subject to criminal prosecution. For example, if the respondent had entered pursuant to a properly acquired visa, his answer about where he was born would not have incriminated him because overstaying a visa is not a crime. In addition, there is no evidence that the respondent is being considered for criminal prosecution for unlawful entry, and his contentions in this regard on appeal are purely hypothetical and speculative.[241]

However, the standard is not that a person must certainly be facing criminal prosecution in order to invoke the Fifth Amendment. Rather, the noncitizen must simply reasonably believe that the evidence might tend to incriminate

237. Normally, adverse inferences should only be permitted where the government has first presented evidence. Matter of Guevara, 20 I&N Dec. 238, 241–42 (BIA 1991) (collecting cases).

238. Gutierrez v. Holder, 662 F.3d 1083, 1085–86 (9th Cir. 2011).

239. *Id.* at 1086.

240. *Id.* at 1091 (citing United States *ex rel*. Bilokumsky v. Tod, 263 U.S. 149, 154–55 (1923)); *see also* United States v. Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) (holding immigration judge not obligated to warn noncitizen of right to remain silent in deportation proceedings).

241. Matter of Findley, 2017 WL 1130670, at *4 (BIA Jan. 31, 2017) (citation omitted).

him, or furnish proof of a link in a chain of evidence.[242] Here, plainly, a person admitting that they were born elsewhere provides a link in the chain of evidence that a person is an "alien," which is an element of illegal entry. Additionally, simply because other people (such as visa holders) would not be incriminated by admitting where they were born does not mean that it would not provide a "link" for others. Lastly, there is no requirement that a person be presently "considered for criminal prosecution" in order to assert the Fifth Amendment—rather, the right is properly invoked when the person might be incriminated in *future* criminal proceedings.[243] As these cases demonstrate, choosing to plead the Fifth can bear harsh consequences and the right itself is applied unevenly.

C. A Legal Gray Area: Bond Proceedings

A developing issue is which party bears the burden of proof during bond proceedings, the process through which detained noncitizens seek release from immigration custody. Bond proceedings are treated as entirely separate proceedings from the main removal hearing process.[244] Although it is ultimately the government's burden to show that a person is deportable (where a person was lawfully admitted or currently has legal status) and an alien (where a person is charged as present without being admitted or paroled),[245] the burden in bond proceedings is distinct. In 1976, the BIA declared that the burden of proof was with the government, as there should be a presumption against detention.[246] In 1999, the BIA reversed itself and held that the noncitizen would shoulder the burden of proving that "his release would not pose a danger to property or persons and that he is likely to appear for any future proceedings."[247]

Thus, the BIA currently holds that the burden is on the respondent to prove that they are not dangerous and not a flight risk.[248] However, increasing numbers of federal courts are finding that the burden of proof

242. Matter of Carrillo, 17 I&N Dec. 30, 32–33 (BIA 1979) (citing Matter of R-, 4 I&N Dec. 720, 721 (BIA 1952)).

243. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976) (quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)).

244. 8 C.F.R. § 1003.19(d) (2020) (stating that consideration of bond "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding").

245. 8 C.F.R. § 1240.8(a) (burden is on the government to prove "by clear and convincing evidence that the respondent is deportable as charged"); 8 C.F.R. § 1240.8(c) (burden is on the government to "first establish the alienage of the respondent" before shifting burden to the noncitizen).

246. Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 81–82 (2016) (citing Matter of Patel, 15 I&N Dec. 666 (BIA 1976)).

247. Matter of Adeniji, 22 I&N Dec. 1102, 1116 (BIA 1999).

248. Matter of Guerra, 24 I&N Dec. 37, 38 (BIA 2006).

rests with the government.[249] Scholars were hopeful that the Supreme Court would address the burden issue in a recent case considering whether noncitizens subject to prolonged detention are entitled to a bond hearing.[250] The Court did not reach the issue.[251] Thus, the burden of proof resting with the noncitizen in bond proceedings means the right against self-incrimination has limited application in this context.

Immigration judges continue to apply the BIA standard, which places the burden of proving non-dangerousness and lack of flight risk on the respondent.[252] As part of that inquiry, respondents must provide proof of identity, including alienage. While evidence presented during bond proceedings "shall form no part of" the removal case in chief,[253] evidence introduced in bond proceedings might be used in later criminal proceedings. Additionally, there remains a risk that the immigration judge could conclude that the noncitizen's testimony in bond proceedings was tantamount to a waiver of the right against self-incrimination and compel them to testify in the removal case.[254] Furthermore, the noncitizen will certainly be required to testify regarding any resolved *and* pending criminal matters to meet their burden of proving they are not dangerous. The decision to remain silent, while technically an option, will result in an adverse inference being drawn by the judge and ultimately may lead to an outright denial of bond.

IV. DIAGNOSING THE PROBLEM

In light of large-scale immigration enforcement and sweeping criminalization of "civil" immigration proceedings discussed *supra* in Section II, at first it may seem somewhat frivolous to discuss in-court procedural protections.[255] Yet, constitutional provisions are meaningless

249. *See, e.g.*, Diaz-Ceja v. McAleenan, No. 19-cv-00824, 2019 WL 2774211, at *10 (D. Colo. July 2, 2019) ("The court finds that allocating the burden to a noncitizen to prove that he should be released on bond under § 1226(a) violates due process as it assigns the risk of error to the party with the greater interest in their individual liberty as balanced against the Government's interests."); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692 (D. Mass. 2018) ("Requiring a non-criminal alien to prove that he is *not* dangerous and *not* a flight risk at a bond hearing violates the Due Process Clause."); Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) ("[T]here has emerged a consensus view that where, as here, the government seeks to detain an alien pending removal proceedings, it bears the burden of proving that such detention is justified.") (collecting cases).

250. Holper, *supra* note 246, at 107–10.

251. Jennings v. Rodriguez, 138 S. Ct. 830, 852 (2018).

252. *Matter of Guerra*, 24 I&N Dec. at 38; *Matter of Adeniji*, 22 I&N Dec. at 1103.

253. 8 C.F.R. § 1003.19(d) (2020).

254. United States v. Stringer, 535 F.3d 929, 938 (9th Cir. 2008) (stating in a criminal case that "defendant's failure to invoke the privilege against self-incrimination waives a later claim of privilege" (quoting United States v. Unruh, 855 F.2d 1363, 1374 (9th Cir. 1987))).

255. Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, THE NEW YORKER (Jan. 23, 2012), https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america [htt

without procedural safeguards in place to ensure that such rights are protected.[256] Indeed, the criminalization of immigration, a trend that the Supreme Court recognized in *Padilla v. Kentucky*, [257] makes fuller application of the Fifth Amendment right against self-incrimination in removal proceedings all the more appropriate.

In criminal proceedings, procedural protections are understood to shield individuals from governmental abuse of power.[258] In civil proceedings that occur between private parties, procedural protections support the idea that the correct outcome will be reached if the processes are fair, or support the legitimacy of a ruling's authority even when an outcome is incorrect.[259] Immigration proceedings are somewhere between these two ends of the spectrum. As will be explored in this section, on one hand, these proceedings are currently categorized as "civil" in nature, but on the other hand, immigrants in removal proceedings are subjected to the coercive power of the government and are defending against deportation just as defendants in criminal proceedings are defending against convictions. Considering that an underlying principle of criminal procedure is to protect individuals against the government, it certainly appears that the same goal could be extended to immigration procedure.

Existing applications of the right against self-incrimination in immigration court lack the nuance that the Fifth Amendment calls for. Thus, the procedures as they are currently utilized are not properly effectuating the substantive law, even under the current understanding that removal proceedings are "civil" in nature. Moreover, given the quasi-criminal nature of some removal proceedings, greater protections must also be recognized there.

A. Why Protect the Right Against Self-Incrimination in the Removal Context?

The reasons why the Self-Incrimination Clause should be expanded in this context can be broken down into three themes: (1) internal restraint, (2) individual dignity, and (3) external validation. Considering the heightened

ps://perma.cc/P52R-VFNB] (quoting William J. Stuntz, who lamented the "current mess, where accused criminals get laboriously articulated protection against procedural errors and no protection at all against outrageous and obvious violations of simple justice").

256. In *Miranda v. Arizona*, the Supreme Court stated that that there must be "procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444 (1966).

257. Padilla v. Kentucky, 559 U.S. 356, 360–64 (2010) (tracing the trend of increasing immigration consequences for criminal convictions under federal law).

258. *See, e.g.*, Miranda v. Arizona, 384 U.S. at 480 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), for the proposition that government officials must "observe the law scrupulously" and uphold the "decency, security, and liberty" of citizens).

259. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004).

level of overlap between criminal and immigrant proceedings, and the fact that removal proceedings bear many of the trappings of the criminal process, the right against self-incrimination should serve the same purpose of protecting individuals against the coercive power of the government. Moreover, the right against self-incrimination protects the innocent as well as the guilty and upholds the dignity of individuals. Even short of valuing the protection of individual rights, procedural fairness legitimizes systems and enhances the public's trust in the system, which leads to greater adherence to the law.

1. Internal Restraint: Prevent Government Overreach

The immigration system is rife with the possibility of government overreach. The plenary power doctrine has limited judicial review of the actions of the legislative and executive branches when it comes to immigration regulation.[260] This presents significant risk of overreach, particularly in a system in which the Federal Rules of Evidence do not apply, immigration judges are paid as government attorneys, and many people lack legal representation.

In particular, procedural protections should be increased in removal proceedings where the proceedings take on an obviously quasi-criminal nature. The classification of certain civil proceedings as "quasi-criminal" is not a foreign concept to the Supreme Court. For example, in the civil forfeiture context, the Court analyzed the forfeiture statutes and concluded that the statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise."[261] The Supreme Court then held that the right against self-incrimination fully applies in civil forfeiture proceedings.[262]

Arguably, removal proceedings that are initiated because of criminal conduct—or where criminal convictions may lead to a finding of removability or statutory ineligibility for relief—indicate that deportation is in fact a penalty resulting directly from crime. Thus, removal proceedings may also be thought of as "quasi-criminal" under the definition articulated in the civil forfeiture context.

At a minimum, there are certainly elements of removal proceedings *following a criminal arrest* that are quasi-criminal in nature. As the Supreme Court noted, criminal convictions and deportation have been "enmeshed" for a century, and "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen

260. *See supra* Part II.A.
261. United States v. U.S. Coin & Currency, 401 U.S. 715, 721–22 (1971).
262. *Id.*

offenders."[263] Transfer directly from criminal custody to immigration custody is an indication that the immigration proceedings are an extension of the criminal process, and that deportation is a penalty resulting from crimes. And the systems in place that are designed to enhance communication between local and state law enforcement with immigration authorities further ensure that removal proceedings will follow the criminal process. Even where this direct transfer does not happen, there is information sharing between the criminal and immigration processes.[264] Thus, even if someone is released from immigration custody, ICE may still discover the criminal conviction and locate them at a later time, showing up at their house or on their way to work to civilly arrest them.

Some criminal courts also enmesh themselves in the immigration realm by inquiring about the immigration status of criminal defendants. For example, in Utah, the criminal courts enter orders specifically releasing defendants to ICE custody.[265] Furthermore, they sometimes enter orders stating that defendants may not return to the country or state illegally. And when the defendant ends up in that jurisdiction again, they issue a warrant.[266]

Moreover, removal proceedings operate similarly to prosecution, as they "primarily regulate the relationship between the state and the individual" and are a system of determining whether to include or exclude members of society, similar to criminal proceedings.[267] Particularly for detained noncitizens, immigration court looks strikingly similar to criminal court. There is a judge, the government is always represented by an attorney who is seeking to enforce the law, there are guards, and there are bond hearings to determine if the noncitizen should remain incarcerated, which involves an assessment of their dangerousness and risk of flight. Some immigration courts are located within detention centers. Some immigration courts require detainees to be shackled throughout their proceedings. Detainees wear color-coded jumpsuits to their court appearances.[268]

The enforcement powers of the government are great and the power of individuals, particularly because the rates of representation by attorneys are so low,[269] is miniscule. As one of the primary rationales for maintaining the

263. *Padilla*, 559 U.S. at 365–66.

264. *See, e.g.*, NAT'L IMMIGR. L. CTR., UNTANGLING THE IMMIGRATION ENFORCEMENT WEB: BASIC INFORMATION FOR ADVOCATES ABOUT DATABASES AND INFORMATION-SHARING AMONG FEDERAL, STATE, AND LOCAL AGENCIES (2017), https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf [https://perma.cc/VH9N-MJUL].

265. The author has examples of this from client cases on file.

266. Again, this is based on an example in the author's files.

267. Stumpf, *supra* note 11, at 380.

268. These descriptions of immigration court are based on the author's observations in the San Francisco and Aurora Immigration Courts.

269. *See infra* note 299.

right against self-incrimination is to prevent government overreach, society has a strong interest in restricting the power of the government to compel a person to testify.[270] For the reasons discussed here, protections for noncitizens, particularly where their proceedings are of a quasi-criminal nature, are lagging.

2. Individual Dignity

A fundamental aspect of democratic societies is the protection of human rights, where dignity "constitutes the first cornerstone in the edifice of . . . human rights."[271] While definitions and applications of the concept of "dignity" are varied, at a minimum it means that every person has intrinsic worth that should be protected from the will of others.[272] Dignity is also described as the autonomy that is inherent in individuals' right to self-determination.[273]

The concept of dignity has featured in parts of constitutional law. As other scholars have articulated, the Supreme Court has continuously recognized dignity as a central underpinning of the Eighth Amendment's prohibition on cruel and unusual punishment.[274] The Supreme Court notes that the Eighth Amendment protects "even those convicted of heinous crimes," which "reaffirms the duty of the government to respect the dignity of all persons."[275] As Danielle C. Jefferis wrote, "Surely, the fundamental nature of dignity—recognized in all people, 'even those convicted of heinous crimes'—applies with at least equal force to people in immigration confinement."[276] And further, surely the fundamental principle of dignity should apply to noncitizens in removal proceedings.[277]

Moreover, the right against self-incrimination has been recognized as a manner of preserving the dignity of people accused of crimes. One scholar explained how the concept of dignity changed when the English courts

270. United States v. Balsys, 524 U.S. 666, 693 (1998).

271. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 68–69 (2011) (quoting Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 46 (2003)).

272. *Id.* at 72–73.

273. *Id.* at 67–68.

274. *See, e.g.*, Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2141–42 ("Since 1958, the Supreme Court has emphasized that the Eighth Amendment's prohibition on cruel and unusual punishments is focused on preserving the dignity of man. . . . Overall, the Court has remained quite consistent in tying the Eighth Amendment to this concept of dignity.").

275. Roper v. Simmons, 543 U.S. 551, 560 (2005).

276. Danielle C. Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L.J. 145, 177 (2020) (quoting *Simmons*, 543 U.S. at 560).

277. César Cuauhtémoc García Hernández, *Deconstructing Crimmigration*, 52 U.C. DAVIS L. REV. 197, 239–49 (2018) (considering the possibility of an immigration scheme that centers human dignity).

shifted the burden of proof from the defendant's need to prove innocence to the prosecution's duty to prove guilt beyond a reasonable doubt: "the dignity of defendants lay not in their ability to tell their stories fully, but rather in their ability to remain passive, to proclaim to the prosecutor, 'Thou sayest,' and to force the state to shoulder the entire load."[278] Thus, dignity is further supported by shifting the balance of power between the individual and the state.

As a democracy that proclaims values such as fairness and justice, it is necessary to ensure that those values exist within our immigration system. Bolstering the right against self-incrimination serves to temper the extreme power differential and thereby furthers the goal of protecting human dignity as noncitizens move through immigration court processes.

3. External Validation: Procedural Justice

Procedural fairness is critical in removal proceedings because the stakes are high. As Justice Brandeis, speaking for the Court, stated, deportation deprives a person of liberty and "may result also in loss of both property and life; or of all that makes life worth living."[279] Even though deportation is not "punishment," the consequences are still harsh, at times even harsher than criminal penalties. As a civil system with dire consequences, procedural protections should be as stringent in removal proceedings as they are in criminal court.

Moreover, procedural justice calls for the right to meaningful participation in legal processes as an "essential prerequisite for the legitimate authority of action-guiding legal norms."[280] In other words, for the outcome of a legal matter to be considered legitimate by the participants in the case, as well as the larger society that observes the outcome, then the system must be regarded as having procedures that sufficiently allow the parties to seek enforcement, or defense of, their rights. Because litigants frequently may believe that the judgments against them are in error, litigants' perception that the procedures were fair may enhance their view of the fairness of the system.[281]

Additionally, from an enforcement perspective, social science data reveals that people's perceptions of procedural fairness increases their perception that immigration policy is legitimate. [282] This held true in studies

278. Alschuler, *supra* note 4, at 2660.
279. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).
280. Solum, *supra* note 259, at 183.
281. *Id.* at 190.
282. Emily Ryo, *Deciding to Cross: The Norms and Economics of Unauthorized Migration*, 78 AM. SOCIO. REV. 574, 592 (2013) [hereinafter Ryo, *Deciding to Cross*]; Ryo, *Legal Attitudes*, *supra* note 20, at 120.

concerning unlawful migration to the United States as well as the legal attitudes of detainees regarding their perceived obligation to obey immigration authorities.[283] Thus, increased protections afforded during removal proceedings, which in turn lead noncitizens to believe in the fairness of the process as a whole, may serve a deterrent effect in terms of noncompliance with immigration laws.

B. Courts' Current Deficiencies in Applying the Right

A significant hurdle to fairness in removal proceedings is that there are insufficient mechanisms in place to address constitutional rights violations by law enforcement in removal proceedings because "immigration courts were not designed to police the police."[284] The fact that immigration courts are not designed to—and immigration judges do not believe they are empowered to—address constitutional wrongs creates fundamental problems in the system. Additionally, the busy dockets of immigration judges are often cited as a reason not to permit constitutional challenges. Nonetheless, immigration judges are trained and do presently rule on some constitutional issues, including the right against self-incrimination.[285] And sacrificing due process and other constitutional rights because immigration judges have high caseloads should not be determinative. Rights should not be sacrificed in the name of efficiency where the stakes are high.

There are several deficiencies in how courts are currently applying the right, which can be immediately remedied. First, alienage must be recognized for what it is—a link in the chain of evidence establishing that a crime was committed. As explained in Section III.B.1, alienage is an element of certain crimes and should be recognized as such. Thus, advocates should challenge attempts by the government or the immigration judge to force noncitizens to testify regarding alienage. After an objection is raised, the immigration judge would then have to consider whether there is a legitimate assertion of the right against self-incrimination. Where there is a legitimate assertion, and the government has no other proof of alienage, the government has failed to meet its burden and the immigration judge should terminate the removal proceedings.

283. Ryo, *Deciding to Cross*, *supra* note 282, at 592; Ryo, *Legal Attitudes*, *supra* note 20, at 120.

284. Chacón, *supra* note 11, at 1568.

285. *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 189, at 20–26. Immigration judges are trained on the rather complicated scenarios in which the right against self-incrimination applies, including relevant considerations in determining whether a person has a valid concern that they are at risk of incriminating themselves. The Benchbook further explains that "the exclusionary rule might apply" where Fourth Amendment violations rise are egregious and sets out the legal requirements for suppression of evidence. *Id.* at 24.

Second, immigration judges need to recognize the discretion they have in whether to draw an adverse inference. A recent case exemplifies the discretion that judges have in this determination. In *United States v. Charles*, the United States District Court for the District of Massachusetts recently considered the application of the right against self-incrimination in denaturalization proceedings.[286] There, the court considered Ms. Charles's repeated invocation of her right to remain silent in response to various discovery requests.[287] On considering the government's motion asking the court to draw adverse inferences with respect to Ms. Charles's silence, the court declined to draw a negative inference after considering three facts: (1) the government had the burden of proving with clear, unequivocal, and convincing evidence that its allegations were true, (2) the stakes for Ms. Charles "are overwhelming," and (3) the government was not "unduly disadvantaged" by Ms. Charles's exercise of the Fifth Amendment because of the government's ability to present testimony, exhibits, and Ms. Charles's prior sworn statements.[288]

A significant lesson for noncitizens in removal proceedings that emerges from this federal district court case is a reminder that the judge has discretion in deciding whether to draw an adverse inference.[289] The factors listed by the *Charles* court are instructive, as similar factors may be in play during removal proceedings. The first factor demonstrates overall that burden of proof is a critical question not only in the strictest sense of determining whether silence is enough for the court to rule that the government has not met its burden of proof, but in determining whether it is *fair* to impose an adverse inference even where the government *has* introduced probative evidence. Second, the stakes in removal proceedings—as in denaturalization proceedings—are extremely high. Third, whether the government is in fact disadvantaged by an exercise of the Fifth Amendment is another consideration that should be weighed by immigration judges. Moreover, the *Charles* court cited to a First Circuit case, which states that "the Fifth Amendment privilege should be upheld unless defendants have substantial need for particular information and there is no other less burdensome effective means of obtaining it."[290] Requiring the government to demonstrate that it has no other less burdensome means to obtain information should also be weighed when the immigration judge is deciding whether an adverse inference is appropriate.

286. United States v. Charles, 456 F. Supp. 3d 268, 276 (D. Mass. 2020).
287. *Id.* at 276–77.
288. *Id.* at 277 (quoting Serafino v. Hasbro, 82 F.3d 515, 518 (1st Cir. 1996)).
289. *Id.* at 276–77 (noting that the law does not mandate adverse inferences).
290. *Id.* at 277 (quoting *Serafino*, 82 F.3d at 518).

Third, the *Charles* case also shows that the door is open for lawful permanent residents (LPRs) in particular to make a compelling argument against adverse inferences. Just as in denaturalization matters, DHS has a heightened burden of proving that a noncitizen is deportable as charged.[291] In *Woodby v. INS*, the Supreme Court noted that the government had the burden to establish allegations in denaturalization as well as expatriation proceedings by "clear, unequivocal, and convincing evidence."[292] The Court further commented that, because many lawful permanent residents have lived in the United States longer than some U.S. citizens, "[t]he immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores."[293] Thus, the Court extended the "clear, unequivocal, and convincing evidence" standard to deportation proceedings.[294]

Fourth, where the purpose of the right against self-incrimination is at least in part to prevent government overreach, it is contrary to that purpose to allow testimony given in civil immigration proceedings to later be admitted in criminal proceedings. Courts have held that questioning during immigration court is not reasonably likely to draw out incriminating statements.[295] Yet, there are certainly instances where statements made during immigration court are in fact the reason for a criminal prosecution.[296] This is a phenomenon that demonstrates how the right against self-incrimination not applying in removal proceedings chips away at the right in the criminal context where it is fully deemed to apply.

Fifth, a significant barrier to the exercise of these rights is the fact that the majority of noncitizens are pro se when they are before an immigration judge. Yet, for procedural—statutory, regulatory, or constitutional—safeguards to be meaningful, noncitizens must have counsel. Representation by an attorney is not guaranteed in removal proceedings.[297] Rather, noncitizens have the "privilege" of hiring counsel at no expense to the government.[298] And in fact, noncitizens are not represented by counsel in the vast majority of detained cases and a large number of non-detained

291. 8 C.F.R. § 1240.8(a) (2020).
292. Woodby v. INS, 385 U.S. 276, 285 (1966).
293. *Id.* at 286.
294. *Id.*
295. *See, e.g.*, United States v. Solano-Godines, 120 F.3d 957, 961 (9th Cir. 1997).
296. United States v. Khan, 324 F. Supp. 2d 1177, 1191 (D. Colo. 2004) ("Here, Khan's admissions during the March 24 [deportation] hearing subjected him to the criminal liability that is the subject of this case.").
297. 8 U.S.C. § 1362 provides that noncitizens in removal proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."
298. "[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings . . . ." 8 U.S.C. § 1229a(b)(4)(A).

cases.[299] While the presence of counsel does not guarantee fair proceedings, "[t]he lawyer places her skilled, trained voice between the state and her client, protects him from further revelations, reframes his case in the most legally advantageous terms, wields the law on his behalf, and generally makes the system work for him as far as the system permits."[300] Studies have shown that legal representation may drastically change not only the outcome of removal proceedings, but simply noncitizens' pursuit of legal remedies available to them. For example, in one study, noncitizens who were not detained during their proceedings sought relief from removal in 78% of cases with counsel versus only 15% without counsel.[301] Indeed, detained noncitizens were twice as likely to win their cases if they had counsel, and non-detained noncitizens were nearly five times as likely to win their cases if they had counsel.[302]

Particularly with respect to the right against self-incrimination, assistance of counsel is critical. As discussed in Section I.A.3, in order to invoke the right, the person must say so explicitly.[303] A party must be aware of the availability of the right, its scope, and feel empowered to raise it. The rules around it are exceedingly complex. Parties can knowingly or unknowingly waive the right against self-incrimination if they voluntarily make incriminating statements.[304] The right can also be waived if they fail to assert it in a timely manner.[305] Furthermore, we cannot expect that the immigration judge, who as provided by regulation—as well as by circumstance where large numbers of noncitizens are unrepresented—has a partial role as an investigator,[306] will assert the person's right to remain silent for them. Thus, there is an inherent conflict in the role of the immigration judge that requires that counsel be present.

A final consideration is that, particularly without the assistance of counsel as occurs in many cases, cultural norms regarding interactions with

299. *See, e.g.*, Eagly & Shafer, *supra* note 153, at 32 (finding that, between 2007 and 2012, 14% of detained noncitizens, as opposed to 66% of nondetained noncitizens, were represented by counsel). A Freedom of Information Act request filed by the Catholic Legal Immigration Network, Inc. revealed that, in the first quarter of 2021, 40% of noncitizens in all pending removal cases were unrepresented. *Executive Office for Immigration Review Adjudication Statistics: Current Representation Rates*, U.S. DEP'T OF JUST. (Jan. 7, 2021), https://www.justice.gov/eoir/page/file/1062991/download [https://perma.cc/3ABX-3LT4].

300. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1470 (2005).

301. EAGLY & SHAFER, *supra* note 154, at 2.

302. *Id.* at 3.

303. *See, e.g.*, Salinas v. Texas, 570 U.S. 178, 183–84 (2013); Berghuis v. Thompkins, 560 U.S. 370, 391 (2010) (Sotomayor, J., dissenting); Minnesota v. Murphy, 465 U.S. 420, 427 (1984) (quoting United States v. Monia, 317 U.S. 424, 427 (1943)).

304. ABA TREATISE, *supra* note 48, at 6.

305. *Id.* at 59.

306. Immigration judges "administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses." 8 U.S.C. § 1229a(b)(1); 8 C.F.R. § 1003.10(b) (2020).

authority figures may also affect a noncitizen's willingness to exercise certain rights such as the right to remain silent, whether in interrogations or during court proceedings.[307] Noncitizens may also feel like they must speak because of the dynamics of the interrogation or courtroom. Thus, it is imperative that people in removal proceedings be advised of and feel empowered to exercise their constitutional rights.

V. PROPOSED REGULATORY AMENDMENT

A. Preliminary Considerations

On considering how to address the immigrant enforcement and adjudication systems' current deficiencies with respect to the Self-Incrimination Clause, certain challenges—namely, the crushing caseload of immigration judges and the low rate of appeals—must be taken into account. These challenges highlight that, rather than relying on the appropriate development of case law, new agency regulations are the best approach to effect necessary change in protecting noncitizens' rights in removal proceedings.

The first hurdle to developing law in the immigration court context is the high caseload of immigration judges. Because there were 442 immigration judges carrying a pending caseload of 987,000 matters at the end of fiscal year 2019, we can estimate that each judge carried a load of approximately 2,233 cases each.[308] Moreover, as of 2018, the DOJ imposed a case completion quota of 700 cases per year on immigration judges.[309] The combination of quotas and oversized dockets forces immigration judges to get rid of cases as quickly as possible, which increases the likelihood that mistakes will be made and that noncitizens will not receive due process, including that they will not be given opportunities to raise and have constitutional issues adjudicated in immigration court. Furthermore, in a hearing by the House Subcommittee on Immigration and Citizenship, it was

307. *See* Davis v. United States, 512 U.S. 452, 460 (1994) ("We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present."); Adam G. Finger, Note, *How Do You Get A Lawyer Around Here? The Ambiguous Invocation of a Defendant's Right to Counsel Under* Miranda v. Arizona, 79 MARQ. L. REV. 1041, 1060–61 (1996) (discussing how factors such as cultural background, gender, and race disadvantage some from articulating their right to counsel).

308. EOIR Case Numbers, *supra* note 18.

309. The head of the immigration judges' union spoke out against the imposition of quotas, calling the quotas the beginning of a "new and dark era" and restating the union's position that Congress should remove the immigration court from the Department of Justice. Yeganeh Torbati, *Head of U.S. Immigration Judges' Union Denounces Trump Quota Plan*, REUTERS (Sept. 21, 2018, 3:04 PM), https://www.reuters.com/article/us-usa-immigration-judges/head-of-u-s-immigration-judges-union-denounces-trump-quota-plan-idUSKCN1M12LZ [https://perma.cc/5WAF-JP5S].

pointed out that EOIR has been hiring immigration judges who do not have any immigration experience,[310] an obvious impediment to expeditious *and correct* resolution of complex issues involving the intersection of constitutional and immigration law.

A second hurdle is the low rate of appeals, which is likely related to the dismal rates of representation by counsel.[311] Immigration courts are bound to follow legal precedent set by the Board of Immigration Appeals, the federal circuit in which each court sits, and the Supreme Court of the United States.[312] While it may appear that there are significant opportunities for judicial review of the decision made by immigration courts and the BIA, the opposite is true. First, the federal courts are limited to reviewing only "constitutional claims or questions of law."[313] Second, the vast majority of cases are resolved at the immigration court level and are never appealed. From fiscal years 2014–2017, only 9–11% of cases were appealed, and the number slightly increased to 17% in 2018.[314] Far fewer are appealed to the federal circuit courts.[315] Thus, any legal errors committed by the immigration courts are very unlikely to be corrected through the appellate process.

Thus, in recognition of the challenges of addressing individual constitutional rights through the court system, this Article proposes the implementation of a new section to the Code of Federal Regulations (CFR). The CFR reflects the agency's interpretation of the federal immigration statute, the Immigration and Nationality Act (INA). So long as the agencies are not exceeding power granted to them by Congress through the INA, the immigration agencies have discretion in determining how to carry out their day-to-day operations by creating regulations.[316] When proposing new rules, agencies post a "Notice of Proposed Rulemaking" in the *Federal*

310. Nolan Rappaport, Opinion, *No Experience Required: US Hiring Immigration Judges Who Don't Have Any Immigration Law Experience*, THE HILL (Feb. 3, 2020, 11:30 AM), https://thehill.com/opinion/immigration/481152-us-hiring-immigration-judges-who-dont-have-any-immigration-law-experience [https://perma.cc/5SYG-YZDR].

311. *See supra* note 299.

312. Matter of E-L-H-, 23 I&N Dec. 814, 815 (BIA 2005) ("[A] Board precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the Board, Congress, or a Federal court."); *see also* Ballesteros v. Ashcroft, 452 F.3d 1153, 1157 (10th Cir. 2006) (citing Latu v. Ashcroft, 375 F.3d 1012, 1019 (10th Cir. 2004), *adhered to in part on reh'g sub nom.* Ballesteros v. Gonzales, 482 F.3d 1205 (10th Cir. 2007)).

313. 8 U.S.C. § 1252(a)(2)(D).

314. U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV., STATISTICS YEARBOOK: FISCAL YEAR 2018, at 40 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/8Z27-Y9FT].

315. Das, *supra* note 95, at 491–92.

316. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

Register and will set a notice-and-comment period for members of the public to weigh in on the proposed rule.[317]

First are a set of principles outlining the problems that should be fixed, followed by proposed additions to the regulations. The overall goal of this proposed solution is procedural fairness. Recognizing that a variety of actors, not just courts, must assess how the right against self-incrimination is applied, the following are proposals regarding how to handle various situations.

B. Proposed Regulations and Explanations

Now we turn to the proposed regulations. These could be inserted as a complete section into the existing regulations, perhaps as a new § 1003.48 in the Executive Office for Immigration Review's 8 C.F.R. § 1003 Subpart C (Immigration Court—Rules of Procedure).

Following the proposed language are explanations of the underlying principles, which are intended to ensure procedural fairness.

> **The Respondent's Right to Silence.**[318]
> (a) *Initial immigration judge advisals.* At the first master calendar hearing, the immigration judge shall ensure that the respondent has been advised of their right not to make a statement regarding alienage or criminal activity, and that any statement made may be used against the respondent. The immigration judge must also advise that an adverse inference may be drawn in certain circumstances, which shall be explained with specificity to the respondent if the issue arises in accordance with subsection (f).
> (b) *Duty to advise prior to taking of testimony.* In any hearing in which testimony will be taken, the immigration judge shall first remind the respondent of their right to silence.

317. OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/3QTS-7BK6].

318. First, a note about terminology. The current regulatory framework uses the word "alien" throughout. *See generally* 8 C.F.R. § 1003. However, "alien" has been criticized for its dehumanizing impact. *See, e.g.*, Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 272–73 (1997) ("In effect, the term alien serves to dehumanize persons. . . . The term alien serves as a device that intellectually legitimizes the mistreatment of noncitizens and helps to mask human suffering."). Indeed, the current presidential administration has ordered U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection to stop using the phrase "illegal alien." Maria Sacchetti, *ICE, CBP to Stop Using "Illegal Alien" and "Assimilation" Under New Biden Administration Order*, WASH. POST (Apr. 19, 2021, 7:14 AM), https://www.washingtonpost.com/immigration/illegal-alien-assimilation/2021/04/19/9a2f878e-9ebc-11eb-b7a8-014b14aeb9e4_story.html?fbclid=IwAR1IRGiYG67hFeHX6DDNlGaQcYNp51v7De_0M5SDdcim9bNTJuEatT1OLZA [https://perma.cc/4RDY-GRJF]. Thus, this proposed section uses the word "respondent" instead.

(c) *Pending criminal proceedings.* Where the respondent provides proof that they have a pending criminal case, or that a criminal case is otherwise unresolved such as where post-conviction relief is being sought or the matter is on appeal, the respondent may choose not to testify regarding the underlying conduct relating to the criminal charges. If the respondent chooses to remain silent, the immigration judge is prohibited from compelling the respondent to speak, and further is prohibited from drawing an adverse inference.

(d) *Burdens of proof.* Where the government bears the burden of proof, the respondent's own testimony may not be taken until the government has provided prima facie evidence. On the government's presentation of such evidence, an immigration judge may draw an adverse inference if the respondent chooses to remain silent.[319]

(e) *Motions to compel.* After a respondent exercises the right to silence, an immigration judge may not compel the respondent to speak. Rather, on a motion by the government, an immigration judge can request that the United States Attorney report the respondent's refusal to testify to a federal district court and request an order compelling the respondent to do so.

(f) *Statutory or regulatory violations by immigration officers.* Where an immigration judge finds that immigration officers violated statutory or regulatory duties and documents or other information were obtained, such documents or other information obtained as a result of the violation shall not be considered to be prima facie evidence triggering the respondent's need to present rebuttal evidence or testimony.

(g) *Adverse inferences.* When a respondent, or their counsel, raises the right against self-incrimination, and DHS has first submitted evidence, the immigration judge shall state with specificity the adverse inference to be drawn, as well as the weight that will be given to the adverse inference, if the respondent chooses to remain silent.

This proposed regulatory framework is poised to address several problems. A significant barrier to exercise of the right against self-incrimination is that people in removal proceedings may not be aware of the right, and even if they are aware of it, may not know how to properly exercise it without the assistance of counsel. Courts have held explicitly that

319. This proposed subsection provides that the noncitizen's testimony may not be taken at all until the government has provided prima facie evidence. This provides protection to unrepresented noncitizens, who may not know that they can remain silent on issues where the government bears the burden of proof. It will avoid the problem where the government can meet its burden simply by questioning the respondent.

there is no right to *Miranda*-like warnings in removal proceedings.[320] The language of the proposed regulation here mirrors the mandatory advisals for initial appearances that are required by the Federal Rules of Criminal Procedure.[321] Thus, these regulations guarantee that all respondents in proceedings are informed about this constitutional right, regardless of whether they have an attorney.

Moreover, the regulations seek to clarify the murkiness surrounding adverse inferences. The threat of an adverse inference can have the same effect as an order to compel. Currently, the immigration judge may not draw an adverse inference if a noncitizen chooses to remain silent and the government has not first provided probative evidence. However, that protection does not go far enough due to the large numbers of noncitizens who go unrepresented in immigration court. Accordingly, noncitizens should be supplied with all information necessary to decide whether to remain silent, and the proposed regulations therefore provide that immigration judges should have to advise the noncitizen regarding the adverse inference to be drawn.

The proposed regulations also aim to lessen the environment of coercion created by extreme power imbalances in the courtroom. The right against self-incrimination cannot be effective in criminal proceedings if noncitizens are compelled to speak or even feel compelled to speak because of the threat of an adverse inference in their removal proceedings. Additionally, there is a threat of harm that the Fifth Amendment is designed to protect against where a noncitizen has currently pending criminal proceedings, or their matter is up on appeal. Thus, the proposed regulations provide that the immigration judge is prohibited from drawing an adverse inference if the noncitizen wishes to remain silent where there is a pending or otherwise unresolved criminal matter.

Moreover, these regulations seek to slightly correct the massive power imbalance between the government and noncitizens. This Article proposes a new rule that the noncitizen's testimony simply may not be taken at all until the government has provided prima facie evidence. Thus, where the government bears the burden of proof, such as in establishing alienage and proving removability, the government should not be able to rely solely on the noncitizen's testimony to meet its burden. This proposed regulation is in line with Judge Posner's argument that the economic benefit of the self-incrimination rule is that, by forcing the government to bear the burden of production, frivolous or harassing use of the courts can be avoided.[322]

320. United States v. Valdez, 917 F.2d 466, 469 (10th Cir. 1990).
321. *See* FED. R. CRIM. P. 5(d)(1)(E).
322. Posner, *supra* note 6, at 1545.

Perhaps an obvious, but not always applied, principle is that documents on which the government relies should be reliable and the information therein should have been legitimately obtained. Statutory and regulatory violations by immigration officers occur frequently and it is time that immigration courts stop rewarding such conduct. Accordingly, such documents may not be relied on for purposes of prima facie evidence of the issue the government is trying to prove (for purposes of the right against self-incrimination), even if the immigration judge finds that suppression of the document is not warranted.

Other possible language is to say: "such documents or information obtained as a result of the violation shall not be admitted as evidence." However, phrasing the statutory-violation regulation in that way would fundamentally change the current standard of admissible evidence in immigration court and is beyond the scope of this Article.[323] Rather, the purpose here is to say that regulatory or statutory violations by immigration officers should mean that such documents or information cannot constitute evidence that then shifts the burden to the noncitizen to speak.

Lastly, there is a question of whether immigration judges should be permitted to compel someone to speak if the person has legitimately asserted their right against self-incrimination, because immigration judges are not adequately equipped to rule on substantive constitutional issues that may expose noncitizens to criminal prosecution. The Immigration Judge Benchbook covers the right against self-incrimination in about three pages.[324] As Jennifer M. Chacón has posited, there are insufficient mechanisms in place to address constitutional rights violations—in part, by law enforcement—in removal proceedings because "immigration courts were not designed to police the police,"[325] which leads to incorrect decisions regarding constitutional rights. Moreover, as discussed *supra*, immigration judges are charged with the role of "investigator," particularly where there the respondent lacks representation by an attorney, and there is an inherent conflict of interest where the judge is both investigator and ultimate adjudicator.[326]

A solution that has been proposed by scholar Daniel Kanstroom is to require the government to file a motion to compel in federal court if they wish to eliminate someone's right to remain silent. The existing regulations provide that, as part of an immigration judge's subpoena power, they can request that the United States Attorney report the witness's refusal to a

323. The author intends to address the issue of suppression of evidence, and the extent to which the Fourth Amendment applies in immigration removal proceedings, in future scholarship.

324. *See* IMMIGRATION JUDGE BENCHBOOK, *supra* note 189, at 20–26.

325. Chacón, *supra* note 11, at 1563.

326. *See supra* note 306 and accompanying text.

federal district court and seek an order requiring the witnesses to comply with the subpoena in immigration court.[327] Thus, this procedure is already somewhat delineated in the regulations. If the government is forced to file a motion to compel in federal district court, then the district court judge would review immigration officials' conduct and also consider whether the testimony should be compelled or not.[328] The benefits of this approach are twofold: (1) the district court adds an additional layer of oversight regarding the propriety of ICE officers' conduct, and (2) it avoids the problem where the immigration judge, who is ultimately deciding the outcome of the case, may discover too much before determining that the person cannot be compelled to speak.[329]

C. Responses to Potential Criticisms

There are a few potential criticisms that could be raised regarding the approach recommended by this Article. One is that the rationales for—and even the utility of—the right against self-incrimination are subject to debate in the criminal context. Even for those who do believe that the right against self-incrimination is an important procedural right, some may argue that regulations are not the correct solution. These critiques, while deserving of consideration, do not outweigh the benefits of the approach prescribed here.

By its proponents, the right against self-incrimination is regarded as a fundamental tenet of American law. There are numerous movie and television show references to the "right to remain silent" and it is commonly known that a witness on the stand is permitted to refuse to speak if they "plead the Fifth"; thus, the right certainly appears central to our rights as people who live in the United States.[330] On the other hand, the Self-Incrimination Clause has been criticized as an outdated concept that obscures the truth.[331] Some scholars have called for the outright abolition of the right, or at least for the imposition of strict limits to it.[332] Still others say that the privilege was intended for narrower interpretation than currently

327. 8 C.F.R. § 1003.35(6) (2020); Kanstroom, *supra* note 21, at 635.

328. Kanstroom, *supra* note 21, at 635.

329. The potential for "miscarriage of justice becomes far more grievous" where judges, who are supposed to be neutral, inquire into silence. Cynthia A. Fissel, *Sounds of Silence in the Second Circuit: Procedural Default and Fundamental Rights*, 52 BROOK. L. REV. 767, 789 (1986) (quoting Hawkins v. LeFevre, 758 F.2d 866, 875 (2d Cir. 1985)).

330. Emily Green, *'You Have the Right to Remain Silent.' Or Do You?*, NPR (Oct. 5, 2014, 5:05 PM), https://www.npr.org/2014/10/05/353893046/you-have-the-right-to-remain-silent-or-do-you#:~:text=For%20decades%2C%20television%20shows%20like,is%2C%20it's%20not%20that%20simple [https://perma.cc/SRY4-ER6L].

331. HELMHOLZ ET AL., *supra* note 32, at 3.

332. *Id.*; *see also* Alschuler, *supra* note 4, at 2634.

afforded, as it was incorporated into the Constitution simply to prohibit specific undesirable methods of interrogation such as torture.[333]

Despite these criticisms, there is support for the fact that the right against self-incrimination serves critical functions and could assist substantially in protecting noncitizens' rights in immigration court. It assists in preventing government overreach, protecting individuals' dignity, and enhancing procedural justice, as laid out *supra* in Section IV.A. More practically speaking, as in the criminal setting, there is utility in remaining silent where the government bears the burden of proof.[334] There is also recognition that because criminal defendants are facing prosecution by an adversarial system with "high conviction rates and heavy punishments," the right against self-incrimination is a fundamental protection.[335] These same protections are warranted for noncitizens in removal proceedings for similar reasons: highly adversarial proceedings, high rates of government success, and an imbalance of power between the government and the noncitizen.

Another criticism worthy of consideration is that there is some speculation about whether the "right to remain silent" is actually in full effect in criminal law either. About 97% of federal cases and 94% of state criminal trials end with a guilty plea—an absolute admission of guilt.[336] Such statistics reflect a significant phenomenon; despite the Constitution's stated commitment to not forcing defendants to self-incriminate, "[f]ew other nations are as dependent as ours on proving guilt from a defendant's own mouth."[337] Thus, the idea that the system is "adversarial" is perhaps a shrinking reality, instead being replaced by an administrative process where prosecutorial discretion reigns.[338] Nevertheless, the right against self-incrimination continues to play an important role in cases where the accused decides to proceed to trial, and it is therefore critical that the right be preserved. Furthermore, the noncitizen should ultimately be the one empowered to decide, in a meaningfully informed manner, whether or not to testify.

Immigrant advocates may also argue that litigation is the best way forward. However, as we have seen with other immigrants' rights issues, litigation often leads to piecemeal victories that do not apply nationwide. Moreover, with the makeup of the Supreme Court as it stands, decisions bolstering such constitutional rights of noncitizens seem unlikely.

333. Alschuler, *supra* note 4, at 2631–32.
334. Natapoff, *supra* note 300, at 1450.
335. *Id.*
336. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/T7QE-8GQC].
337. Alschuler, *supra* note 4, at 2637.
338. Natapoff, *supra* note 300, at 1503–04.

Procedural protections must be available immediately to the approximately one million people who are currently in the immigration enforcement system. Thus, this proposed regulatory solution is preferable.

CONCLUSION

Although courts still consider immigration enforcement—including apprehension, detention, and removal proceedings—to be a civil system, there is an increasing overlap between criminal and immigration law. The expansion of immigration incarceration, particularly prolonged detention, increasing penalties for interactions with the criminal justice system (not limited to convictions), and aggressive criminal prosecution of immigration law violations necessitate examining the system with fresh eyes. Even the Supreme Court has recognized that deportation is becoming an ever more common penalty for criminal conduct.

The lack of adequate procedural protections, including misapplication of the right against self-incrimination, bears important consequences in immigration court. The scope of the Self-Incrimination Clause should be recognized such that current protections are correctly enforced in protecting noncitizens' constitutional rights. Additionally, new regulations could go a long way in clarifying those rights and slightly expanding the right against self-incrimination to more closely match the protection afforded in criminal court, in recognition of the quasi-criminal aspects of the immigration enforcement scheme. Of course, this Article imagines that we continue in the current reality of immigration being viewed as a civil system. If removal proceedings are one day recognized as being at least quasi-criminal, the application of the right against self-incrimination would expand, and some of the regulations proposed here would likely become redundant.